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No. 00-973-CFY Title: United States, Petitioner
v.
Alphonso Vonn

Docketed: December 14, 2000 Court: United States Court of Appeals for the Ninth Circuit

See also:
00-5231

Entry	Date	Proceedings and Orders
	Dec 13 2000	Petition for writ of certiorari filed. (Response due January 26, 2001)
	Jan 12 2001	Order extending time to file response to petition until January 26, 2001.
	Jan 26 2001	Brief of respondent Alphonso Vonn in opposition filed.
	Jan 26 2001	Motion of respondent for leave to proceed in forma pauperis filed.
	Feb 7 2001	DISTRIBUTED for Conference of February 23, 2001
	Feb 8 2001	Reply brief of petitioner United States filed.
	Feb 26 2001	Petition GRANTED. SET FOR ARGUMENT November 6, 2001. **********
	Feb 26 2001	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Mar 9 2001	Order extending time to file the government's brief on the merits to and including May 3, 2001.
	Apr 30 2001	Joint appendix filed.
	May 3 2001	Order further extending time to file government's brief on the merits to and including May 10, 2001.
	May 9 2001	Brief of petitioner United States filed.
	Jun 1 2001	Order extending time to file respondent's brief on the merits to and including July 13, 2001.
	Jul 13 2001	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Jul 13 2001	Brief of respondent Alphonso Vonn filed.
	Aug 14 2001	CIRCULATED.
	Aug 15 2001	Reply brief of petitioner United States filed.
	Aug 28 2001	Record filed.
	Sep 4 2001	Record filed.
	Oct 6 2001	ARGUED.

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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ALPHONSO VONN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court's failure to advise a counseled defendant at his guilty plea hearing that he has the right to the assistance of counsel at trial, as required by Federal Rule of Criminal Procedure 11(c)(3), is subject to plain-error, rather than harmless-error, review on appeal when the defendant fails to preserve the claim of error in the district court.

2. Whether, in determining if a defendant's substantial rights were affected by a district court's deviation from the requirements of Federal Rule of Criminal Procedure 11(c)(3), the court of appeals may review only the transcript of the guilty plea colloquy, or whether it may also consider other parts of the official record.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 224 F.3d 1152. A prior opinion of the court of appeals, which was withdrawn on rehearing (App., *infra*, 11a-22a), is reported at 211 F.3d 1109.

JURISDICTION

The initial judgment of the court of appeals was entered on April 20, 2000. The judgment of the court of appeals on rehearing was entered on September 14, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

1. Rule 11(c) of the Federal Rules of Criminal Procedure, titled "Advice to Defendant," provides, in pertinent part:

> Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> * * * * *
>
> (3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination[.]

2. Rule 11(h) of the Federal Rules of Criminal Procedure, titled "Harmless Error," provides: "Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded."

3. Rule 52 of the Federal Rules of Criminal Procedure, titled "Harmless Error and Plain Error," provides:

> (a) HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Following guilty pleas, respondent was convicted in the United States District Court for the Central District of California on one count of conspiracy to commit bank robbery, in violation of 18 U.S.C. 371; one count of aiding and abetting armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d) and 18 U.S.C. 2; and one count of using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). App., *infra*, 2a-3a. Respondent was sentenced to 97 months' imprisonment, to be followed by three years' supervised release. *Id.* at 24a-25a. The court of appeals vacated respondent's guilty pleas and sentence and remanded for further proceedings. *Id.* at 10a.

1. a. On February 27, 1997, respondent and two co-defendants robbed a bank in Long Beach, California. App., *infra*, 2a. Respondent was arrested shortly thereafter pursuant to a criminal complaint that charged him and his co-defendants with armed bank robbery and with using and carrying a firearm during and in relation to a crime of violence. *Id.* at 2a-3a. On February 28, 1997, respondent made his initial appearance on the complaint. At that appearance, the magistrate judge advised the defendants who were present, including respondent, of their constitutional rights, including "the right to retain and to be represented by an attorney of your own choosing at each and every stage of the proceedings against you," and, "if you cannot afford an attorney," the right "to request that the court appoint an attorney to represent you." Gov't C.A. Supp. Ex. Rec. 4. Respondent orally confirmed that he had heard and understood his rights. *Id.* at 10. The magistrate then found that respondent was

indigent and appointed a Deputy Federal Public Defender to represent him. *Id.* at 10-11.

On March 14, 1997, a grand jury returned a two-count indictment charging respondent with one count of armed bank robbery, in violation of 18 U.S.C. 2113, and one count of using and carrying a firearm during and in relation to that robbery, in violation of 18 U.S.C. 924(c). Resp. C.A. Ex. Rec. 1-3. On March 17, 1997, respondent appeared in court, represented by his appointed counsel, for his arraignment. The magistrate judge advised the defendants present, including respondent, of their constitutional rights, including the right "to be represented by counsel at all stages of the proceedings," and also advised the defendants that, "[i]f you don't have the money or means to hire an attorney, I will appoint an attorney to represent you without cost or expense to you." Gov't C.A. Supp. Ex. Rec. 16-17. Respondent's counsel then provided the court with respondent's signed "Statement of Defendant's Constitutional Rights," in which respondent acknowledged his constitutional right "to be represented by counsel at all stages of the proceedings against [him]." *Id.* at 24-25.[1] Respondent's counsel also signed a statement at the end of that form indicating that counsel was "satisfied that [respondent] has read this Statement of Rights * * * and that [he] understands them." *Id.* at 25. That document was filed in the record of the case. Resp. C.A. Ex. Rec. 70.

b. At a May 12, 1997, status conference before the district judge, respondent, represented by the same court-appointed counsel who had represented him at his

[1] Because of a broken arm, respondent could not actually sign his name on this form; instead, he marked the signature line with the letter "X." Gov't C.A. Supp. Ex. Rec. 19, 25.

arraignment and at three earlier status conferences, indicated his intention to plead guilty to the bank robbery count and to proceed to trial on the firearm count. Resp. C.A. Ex. Rec. 12. The court clarified with respondent's counsel that respondent's position was that he participated in the robbery but that, contrary to the government's contention, he did not use a firearm during the robbery. *Id.* at 13; App., *infra*, 16a-17a & n.3. The court then asked respondent's counsel, in respondent's presence, whether there was "any point in taking this plea" since "the jury is going to have to hear the whole case anyway * * * to figure out whether or not he used a gun." *Ibid.* Respondent's counsel reiterated that "my client's desire [is] to plead guilty to [the bank robbery charge]." *Ibid.*

The court then proceeded to engage in a colloquy with respondent, as required by Federal Rule of Criminal Procedure 11, to ensure that respondent's guilty plea was voluntary and intelligent and was supported by a factual basis. See Fed. R. Crim. P. 11. During the course of that colloquy, the court advised respondent that, by pleading guilty, he would be giving up various constitutional rights, including the right against self-incrimination, the right to a trial, the right to confront and cross-examine witnesses against him, and the right to present evidence on his own behalf at trial. Resp. C.A. Ex. Rec. 17. Respondent stated that he waived those rights. *Ibid.* The court did not expressly tell respondent at that time, however, that if he proceeded to trial, he would have the right to the assistance of counsel at that trial. Respondent's counsel did not object to that deficiency. The court then accepted respondent's guilty plea to the bank robbery charge. *Id.* at 20. At the conclusion of the hearing, the court informed counsel for both parties, in respondent's

presence, that the firearm charge was scheduled for trial on June 10, 1997. *Id.* at 21; App., *infra*, 17a n.4. As a result of a scheduling conflict involving defense counsel, however, trial was later rescheduled to August 12, 1997. See Resp. C.A. Ex. Rec. 72.

c. On July 29, 1997, a three-count superseding indictment was returned charging respondent with bank robbery (to which he had already pleaded guilty), using and carrying a firearm during and in relation to a bank robbery, and a third count of conspiracy to commit bank robbery. Resp. C.A. Ex. Rec. 4-9. On September 3, 1997, at a hearing, respondent stated his intention to plead guilty to the conspiracy and firearm counts. *Id.* at 25-26. The court then again advised respondent that by pleading guilty he was giving up various constitutional rights, but it again omitted specific mention of the right to counsel at trial. *Id.* at 29-30.

After the court determined that there was a factual basis for the guilty pleas, the Assistant United States Attorney stated to the court that she did not "remember hearing the Court inform the defendant of his right to assistance of counsel." App., *infra*, 3a. The court responded that "I didn't because [he] is represented by counsel." *Ibid.*[2] Respondent's counsel raised no objection to the court's failure to advise respondent specifically of the continuing right to the assistance of counsel at trial. The court then accepted respondent's guilty

[2] Federal Rule of Criminal Procedure 11(c)(2) provides that the court must inform the defendant, "*if the defendant is not represented by an attorney*, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant" (emphasis added). Rule 11(c)(3), however, requires the court to provide advice about the right "to the assistance of counsel" at trial without limiting the requirement to unrepresented defendants.

pleas on the conspiracy and firearm charges. Resp. C.A. Ex. Rec. 33.

d. On May 14, 1998, respondent moved to withdraw his guilty plea on the firearms charge only, on the ground that it lacked a factual basis. The district court denied that motion. Resp. C.A. Ex. Rec. 58-59. Respondent did not move to withdraw his guilty pleas to the other charges. On June 22, 1998, respondent was sentenced to 97 months' imprisonment. App., *infra*, 23a-24a.

2. On appeal, respondent argued for the first time that his guilty pleas on all three counts were invalid because, among other things, the district court had failed to advise him of his continuing right to the assistance of counsel at trial, as required by Rule 11(c)(3), before accepting his guilty plea. Resp. C.A. Br. 15-21. The court of appeals found respondent's Rule 11(c)(3) claim "dispositive," App., *infra*, 13a n.1, and vacated respondent's guilty pleas, *id.* at 22a.

The court first observed that "[t]he Government correctly points out that we do not normally consider issues raised for the first time on appeal." App., *infra*, 15a. The court nonetheless rejected the government's argument that respondent had forfeited his Rule 11 claim, and held (*ibid.*) that the normal plain-error standard of review applicable to claims of error not raised at trial, as set forth in Federal Rule of Criminal Procedure 52(b), "does not apply to Rule 11 errors" because "Rule 11 has its own review mechanism, which supersedes the normal waiver rule." For that proposition, the court cited *United States* v. *Odedo*, 154 F.3d 937, 940 (9th Cir. 1998), which had held that "the Rule 11(h) 'harmless error' standard applies to all Rule 11 errors, regardless of whether they were ever raised before the district

court."[3] Therefore, the court stated, the case turns on whether "the district court's error was harmless." App., *infra*, 15a.

The court then noted that Rule 11(h) requires the court to "disregard variances from the colloquy that do not 'affect substantial rights.'" App., *infra*, 15a (quoting Fed. R. Crim. P. 11(h)). According to the court, the "affect[ing] substantial rights" language of Rule 11(h) "mean[s] that we must inquire whether the defendant was aware of his rights despite the judge's failure to advise him." *Ibid.* Applying that standard, the court determined that the district court's error was not harmless because the record did not contain "unequivocal evidence" that respondent was aware that he had the continuing right to the assistance of counsel at trial. *Id.* at 16a-21a. The court of appeals rejected the government's arguments that the district court's statements at the May 12, 1997, status conference concerning the need for a jury trial on the firearm charge and the impending June 10, 1997, trial date (see pp. 4-6, *supra*), demonstrated respondent's awareness that he would be represented by counsel at trial. App., *infra*, 16a-17a & nn.3-4. The court found those statements insufficiently clear to establish with confidence respondent's awareness that he would be represented by counsel at trial. *Id.* at 18a.

The court of appeals also noted that, at respondent's September 3, 1997, guilty plea hearing, the prosecutor

[3] In *Odedo*, the Ninth Circuit rejected the government's argument that a Rule 11 claim of error is "waived," and therefore subject only to plain-error review on appeal, if it is not preserved in the district court. The court instead agreed with the decision in *United States* v. *Lyons*, 53 F.3d 1321, 1322 n.1 (D.C. Cir. 1995), that such claims, even if not preserved, are reviewed for harmless error on appeal. See *Odedo*, 154 F.3d at 939-940.

had drawn the district court's attention to the fact that it had not specifically advised respondent of his right to counsel at trial. The court of appeals "sympathize[d]" with the government's "good faith effort" to address that deficiency below, but it determined that the transcript "does not yield the unequivocal evidence we would need before we could deem [respondent] aware of his continuing right to counsel at trial." App., *infra*, 18a-19a.

3. The government filed a petition for panel rehearing, pointing out that the court's harmless-error analysis failed to take into account other parts of the official record that evinced respondent's awareness of his right to counsel at trial. In particular, the government pointed to respondent's signed acknowledgment of his constitutional rights, as well as recent transcriptions of respondent's initial appearance and arraignment proceedings at which respondent was specifically advised of his right to counsel at trial and stated that he understood his rights. Gov't Pet. for Reh'g 9-10. The government also filed a motion to have those transcripts (which were part of the official district court record) made part of the record on appeal, and explained that their consideration "is necessary and appropriate for the court to evaluate properly the record in this case." See *id.* at 2 n.1, 9 n.4.[4] Respondent filed a

[4] The government's motion was accompanied by the prosecutor's declaration, in which she explained that she first realized that the transcripts of respondent's initial appearance and arraignment proceedings might reflect respondent's awareness of his right to counsel at trial "[i]n preparation for and shortly before oral argument." Decl. of Elaine Lu ¶ 4 (6/2/2000). The prosecutor did not order the transcripts at that time because of the impending oral argument, but did have occasion to order them in the course of

response to the petition for rehearing, in which he argued that the court was precluded from relying on those pre-plea materials under its decisions in *United States* v. *Odedo*, 154 F.3d 937 (9th Cir. 1998), and *United States* v. *Gastelum*, 16 F.3d 996 (9th Cir. 1994), which, according to respondent, limited the scope of Rule 11(h) harmless-error review to the four corners of the guilty plea hearing transcript. Resp. Opp. to Pet. for Reh'g 10-11.

4. The panel withdrew its opinion and issued a new one, in which it again vacated respondent's guilty pleas based on the Rule 11 violation. App., *infra*, 1a-10a. The court first reaffirmed that a defendant's claim, raised for the first time on appeal, that the district court failed to provide him with part of the advice of rights required by Rule 11(c)(3) is reviewed for harmless error, rather than plain error. *Id.* at 5a-6a. The court also reaffirmed that the harmless-error analysis requires it to determine "whether the defendant was aware of his rights despite the judge's failure to advise him." *Id.* at 6a.

The court then held, based on its prior decisions in *Gastelum* and *Odedo*, that "we are limited to what the record of the plea proceeding contains" in conducting Rule 11(h) harmless-error analysis. App., *infra*, 6a.[5] Accordingly, the court stated, "we cannot consider the

briefing a later motion by one of respondent's co-defendants to join in respondent's brief. *Id.* at ¶¶ 6-8.

[5] The government had argued in its appellate brief that the court should consider the entire record, not just the plea proceeding, to make its prejudice inquiry. See Gov't C.A. Br. 25-32. The government argued that *Gastelum* (on which *Odedo* had relied) stood for the proposition that an appellate court may consider only the plea proceeding to determine whether the district court complied with Rule 11, not that it is so limited in making the prejudice analysis. *Id.* at 28.

government's claim that [respondent] learned of his right to counsel during earlier court proceedings" in this case. *Id.* at 6a-7a. Because the court had previously concluded that the guilty plea hearing transcript did not unequivocally demonstrate that respondent was aware that he had the right to counsel at trial, and because it reaffirmed that conclusion on rehearing (*id.* at 7a-9a), it vacated respondent's guilty pleas and remanded the case. *Id.* at 10a.[6]

REASONS FOR GRANTING THE PETITION

The court of appeals has held that a defendant's claim that the district court failed to provide him with the complete advice required by Federal Rule of Criminal Procedure 11(c), raised for the first time on appeal, is not forfeited and—unlike other claims not raised in the district court—is subject to appellate review under a harmless-error standard that requires the government to prove that the defendant was otherwise aware of the omitted information. The court of appeals also held that, in determining whether a particular Rule 11 error affected a defendant's substantial rights, the court of appeals may not look beyond the transcript of the guilty plea hearing. Each of those holdings contributes to an existing circuit conflict on a question of significant and recurring importance to the federal criminal justice system. Each holding is also incorrect. Accordingly, this Court should grant certiorari to review both aspects of the court of appeals' decision.[7]

[6] Pursuant to the government's unopposed motion under Federal Rule of Appellate Procedure 41(d)(2), the court stayed the issuance of its mandate pending the filing of this petition for a writ of certiorari.

[7] The first question presented by this petition, concerning the applicable standard of review, is also presented in the pending cer-

1. a. The court of appeals ruled that claims of Rule 11 error raised for the first time on appeal are reviewed under a harmless-error, rather than plain-error, standard. That holding perpetuates and reinforces a divergence of opinion among the circuits on the standard of review governing such claims. The First, Sixth, Seventh, and Eleventh Circuits have clearly stated that they apply plain-error review in such circumstances. See *United States* v. *Gandia-Maysonet*, 227 F.3d 1, 5-6 (1st Cir. 2000); *United States* v. *Bashara*, 27 F.3d 1174, 1178-1179 (6th Cir. 1994), cert. denied, 513 U.S. 1115 (1995); *United States* v. *Cross*, 57 F.3d 588, 590 (7th Cir.), cert. denied, 516 U.S. 955 (1995); *United States* v. *Quinones*, 97 F.3d 473, 475 (11th Cir. 1996). In contrast, the Ninth Circuit (in which this case arose), and the District of Columbia Circuit have stated that they apply harmless-error, rather than plain-error, review. App., *infra*, 5a (citing *United States* v. *Odedo*, 154 F.3d 937, 940 (9th Cir. 1998)); *United States* v. *Lyons*, 53 F.3d 1321, 1322 n.1 (D.C. Cir. 1995).

The Fifth Circuit has stated that such cases are *not* governed by the plain-error standard, see *United States* v. *Glinsey*, 209 F.3d 386, 394 n.8, cert. denied, 121 S. Ct. 282 (2000), but it has also stated that the defendant

tiorari petition in *Nogales* v. *United States*, petition for cert. pending, No. 00-5231 (filed July 17, 2000). In our response (at 9-13) to the petition in *Nogales*, we have explained that this case presents a more suitable vehicle for addressing the standard-of-review question for several reasons. Those reasons include the presence of the second question in this case, which independently warrants this Court's review, the clarity of the court of appeals' holding in this case that the harmless-error standard applies, and the fact that *Nogales* is an unpublished opinion. Accordingly, we have suggested that the petition in *Nogales* be held pending the Court's disposition of this case.

"must * * * show that the district court's variance affected his substantial rights," *id.* at 394—suggesting that the defendant bears the burden of persuasion on the question of prejudice, which is consistent with plain-error review. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (explaining that an "important difference" between plain-error and harmless-error is "who bears the burden of persuasion with respect to prejudice"). The Fifth Circuit and the Ninth Circuit have also framed the nature of the prejudice inquiry quite differently. The Ninth Circuit in this case stated that the government was required to prove that respondent was otherwise aware of the constitutional rights that the district court omitted from its advice. See App., *infra*, 6a. The Fifth Circuit, however, has stated that, to show an effect on a defendant's substantial rights to establish prejudice, the defendant must show that the omitted information was "a material factor affecting the defendant's decision to plead guilty." *United States* v. *Cuevas-Andrade*, No. 99-10976, 2000 WL 1658211, at *2 (Nov. 3, 2000) (brackets omitted). Similarly, the Tenth Circuit has stated that the defendant must "show that knowledge of the omission or variance from Rule 11 would have changed his decision to plead guilty." *United States* v. *Wright*, 930 F.2d 808, 810 (1991) (internal quotation marks and emphasis omitted).

The existence of a circuit conflict concerning the applicable standard of review is clear. The courts of appeals themselves have explicitly recognized the conflict. See *Gandia-Maysonet*, 227 F.3d at 5; *Quinones*, 97 F.3d at 475 n.3.[8] This case, moreover, presents a

[8] Although the decisions in the courts of appeals have involved a wide array of Rule 11 claims, the courts have generally not

suitable vehicle for this Court to address the standard-of-review question. The court of appeals in this case clearly applied a harmless-error standard; that is, it required the government to prove that the error did not affect respondent's substantial rights in that respondent was otherwise aware of his right to counsel. Equally clearly, the court rejected the government's contention that respondent's failure to raise the claim in the district court amounted to a waiver (or, more accurately, a forfeiture) of that claim. App., *infra*, 5a (citing *Odedo*, 154 F.3d at 940); cf. *Olano*, 507 U.S. at 733 (distinguishing waiver from forfeiture).

b. The court of appeals erred in holding that the harmless-error, rather than plain-error, standard should be applied in this case. The better reasoned approach, adopted by the majority of the circuits in reliance on well-settled forfeiture principles, applies the plain-error standard of review to Rule 11 claims not raised at trial. The rationale is clear: the raise-or-forfeit principle serves important interests of judicial economy and fairness. See *Gandia-Maysonet*, 227 F.3d at 5; cf. *Wainwright* v. *Sykes*, 433 U.S. 72, 88-89 (1977) (discussing the policies underlying a contemporaneous-objection rule). Those defendants who raise a claim of error in the district court in the first instance are entitled to have the government bear the burden of

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distinguished among the kinds of claims in fashioning the standard of review; rather, they have treated the applicable standard of review governing claims of Rule 11 error raised first in the court of appeals as a unitary one. For example, in *United States* v. *Saxena*, 229 F.3d 1 (2000), the First Circuit recently held that its decision in *Gandia-Maysonet*, *supra*, holding that an unpreserved claim of Rule 11(c)(1) error is reviewed under a plain-error standard, "clearly indicates" that Saxena's Rule 11(e)(2) claim of error likewise "must survive plain-error review." *Id.* at 8 n.2.

proving harmlessness. But "the bar rises—and the stiffer *Olano* plain-error test applies" to those defendants who forfeit their claim of error by failing to object before the district court, thereby stripping the trial court of any opportunity to resolve or cure the claimed error. *Gandia-Maysonet*, 227 F.3d at 5.

The court of appeals employed a different, and we believe faulty, rationale in reaching its contrary conclusion. It reasoned that Federal Rule of Criminal Procedure 11(h)—which states that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded"—"supersede[d] the normal [Rule 52] waiver rule" in all cases of claimed Rule 11 error. App., *infra*, 5a. The court of appeals' reliance on Rule 11(h) as a basis for departing from normal plain-error principles rests on a misunderstanding of the purpose of that Rule.

Before the 1983 enactment of Rule 11(h), a number of courts of appeals had read this Court's decision in *McCarthy* v. *United States*, 394 U.S. 459 (1969), to hold that all Rule 11 errors required reversal without a case-specific assessment of prejudice. Rule 11(h) "merely reject[ed] the extreme sanction of automatic reversal." Fed. R. Crim. P. 11(h) advisory committee's note (1983 Amendment). Rule 11(h) is thus best understood not as rejecting the applicability of plain-error review when no objection is lodged, but rather as simply overturning *McCarthy* and requiring a case-by-case assessment into whether the error "affect[ed] substantial rights"—similar to the case-by-case assessment required by Rule 52 of all other claims of error. See *Gandia-Maysonet*, 227 F.3d at 6 (so describing the "narrow purpose" of Rule 11(h)); see also *Olano*, 507 U.S. at 731 (observing that "[n]o procedural principle is more familiar to this Court than that a constitutional

right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it") (internal quotation marks omitted). Accordingly, only a properly preserved Rule 11 claim should be reviewed under a harmless-error standard on appeal; a Rule 11 claim not preserved in the district court should be reviewed under a plain-error standard.

c. Closely related to the standard of appellate review is the question of the showing that must be made to establish whether the defendant's substantial rights were affected by the trial court's deviation from Rule 11. As we have noted (pp. 8-9, 11, *supra*), the court of appeals stated in this case that the government was required to prove, under a harmless-error analysis, that respondent was aware of his right to counsel at trial. The Fifth and Tenth Circuits have stated, however, that the defendant must show that the error affected his decision to plead guilty. See p. 13 *supra*. Similarly, the First Circuit, applying plain-error review, has indicated that the fundamental question is whether the error affected the defendant's decision to plead guilty. See *Gandia-Maysonet*, 227 F.3d at 6.

The general test for assessing whether an error affected a defendant's substantial rights is whether the error was "prejudicial," *i.e.*, whether it had an effect on "the outcome of the district court proceedings." *Olano*, 507 U.S. at 734. That test should apply to Rule 11 errors as well. See *Lyons*, 53 F.3d at 1323. In a case like this one, where the error was the omission of advice about a specific right, the proper means of applying the *Olano* test is to ask whether the Rule 11 error affected the defendant's decision to plead guilty. If the defendant would have pleaded guilty even in the

absence of the error, then that error had no effect on the defendant's substantial rights.[9]

Similar considerations inform the final aspect of the plain-error review in this context: whether the court of appeals should exercise its discretion to correct the error. Cf. *Johnson* v. *United States*, 520 U.S. 461, 469 (1997). As this Court observed in *Olano*, the plain-error standard requires the defendant to show that the error affected the "fairness, integrity, or public reputa-

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[9] The inquiry whether the defendant would have pleaded guilty in the absence of the error is broader than the question whether the defendant was otherwise aware of the information that the district court failed to provide in the Rule 11 colloquy. If the defendant was otherwise aware of that information (because, for example, he received the same information at an earlier court hearing) but nonetheless pleaded guilty, then it would follow that the district court's failure to provide him with the information again at the guilty plea colloquy did not affect the defendant's decision to plead guilty. But there may well be circumstances in which a court could conclude that the defendant was sufficiently determined to plead guilty that he would have done so even in the absence of the specific information omitted from the Rule 11 colloquy. In addition, there are cases in which a court could conclude that a Rule 11 error had no effect on the outcome of the proceedings (and thus had no effect on the defendant's substantial rights) even without a retrospective assessment of whether the defendant would have pleaded guilty without the error. See, *e.g.*, *United States* v. *Raineri*, 42 F.3d 36, 42-43 (1st Cir. 1994) (trial court's erroneous notice about the maximum sentence was harmless when the court imposed a sentence within the maximum term it had identified in the Rule 11 colloquy, and there was no reason to conclude that defendant had any expectation of a lesser penalty), cert. denied, 515 U.S. 1126 (1995); *United States* v. *McCarty*, 99 F.3d 383 (11th Cir. 1996) (district court's failure to mention possibility of restitution order during Rule 11 colloquy was harmless error, since defendant had notice that he might be required to pay a fine of even greater amount than the restitution that was ordered).

tion of judicial proceedings." 507 U.S. at 732. Under that standard, a defendant does not show plain error unless he shows that he would not have pleaded guilty in the absence of the error, that his plea lacked a factual basis, or that his guilty plea was constitutionally defective. "In the taking of a guilty plea under Rule 11, the critical concerns are that the plea be voluntary and that there be an admission, colloquy, proffer, or some other basis for thinking that the defendant is at least arguably guilty." *Gandia-Maysonet*, 227 F.3d at 6. The specific advice of rights required by Rule 11(c) is not itself constitutionally required for acceptance of guilty pleas, but rather is intended to ensure that the defendant's plea is voluntary, intelligent, and supported by a factual basis. See *McCarthy*, 394 U.S. at 465. Accordingly, if a defendant acted knowingly and voluntarily in pleading guilty, and if the defendant was determined to plead guilty, such that the specific advice that the district failed to provide would have been insignificant to the defendant's plea decision or of no consequence in light of the sentence later imposed, then there is no basis for concluding that the omission affected the fairness, integrity, or reputation of the proceeding.

2. The court of appeals also held that, in considering whether a Rule 11 error "affect[ed] substantial rights," a reviewing court is confined to the four corners of the transcript of the plea colloquy proceeding, at least on direct appeal. There is a disagreement among the circuits concerning the scope of the record that may be considered on appeal in these circumstances, and that issue likewise merits this Court's review.

The Ninth Circuit, in which this case arose, confines itself strictly to the transcript of the plea hearing to determine whether the defendant was otherwise aware of the information omitted from the district court's Rule

11 colloquy (here, the fact that respondent had the constitutional right to the assistance of counsel at trial). App., *infra*, 6a. In contrast, every other circuit that has considered this issue has held that the transcript of the plea colloquy is but one part of the record that may be considered in assessing whether a Rule 11 error affected the defendant's substantial rights. For example, the Seventh and Eleventh Circuits have held that a written plea agreement signed by the defendant may be considered. *United States* v. *Jones*, 143 F.3d 1417, 1420 (11th Cir. 1998) (failure to advise defendant of mandatory minimum sentence harmless in light of provision in written plea agreement specifying this information); *United States* v. *Lovett*, 844 F.2d 487, 492 (7th Cir. 1988) (failure to advise defendant of right to the assistance of counsel harmless in light of written plea agreement). The Second Circuit similarly has held that a court may consider written submissions presented to the district court in support of a motion for a change of plea. *United States* v. *Maher*, 108 F.3d 1513, 1520-1524 (1997). The District of Columbia Circuit has held that a reviewing court may consider the transcripts of a defendant's arraignment and sentencing hearing. *United States* v. *Lyons*, 53 F.3d 1321, 1322-1323 (1995) (failure to advise defendant of maximum possible fine harmless in light of advisement at arraignment and defendant's failure to express surprise at fine actually imposed at sentencing). The Fifth Circuit has held that a reviewing court is entitled to consider post-plea materials that are "temporally relevant," including the transcript of the sentencing hearing, to assess whether a Rule 11 error is harmless. *United States* v. *Johnson*, 1 F.3d 296, 302 (1993).

The majority rule in the courts of appeals, permitting review of the entire official record to determine

whether a Rule 11 error violated a defendant's substantial rights, is more consistent with a proper understanding of both plain-error and harmless-error review, than is the Ninth Circuit's minority position. As the Court observed in *United States* v. *Young*, 470 U.S. 1 (1985), "[e]specially when addressing plain error, a reviewing court cannot properly evaluate a case except by viewing such a claim against the *entire record.* * * * It is simply not possible for an appellate court to assess the seriousness of the claimed error by any other means." *Id.* at 16 (emphasis added). The same is true of harmless-error review. See Fed. R. Crim. P. 52(a) advisory committee's note (observing that harmless-error rule is a restatement of prior law, which required reviewing court to "give judgment after an examination of *the entire record* before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties") (emphasis added).

The Ninth Circuit's rule that it will review only the transcript of the plea hearing to determine whether a defendant's substantial rights were affected by a Rule 11 error conflicts not only with the decisions of the other circuits that have considered that issue, but also with the plain intent of Rule 11(h). The Advisory Committee Notes to Rule 11(h) explain that the question of harmless error should be resolved "solely on the basis of the Rule 11 transcript *and the other portions (e.g., sentencing hearing) of the limited record made in such cases.*" Fed. R. Crim. P. 11(h) advisory committee's note (1983 Amendment) (emphasis added) (internal quotation marks omitted). Thus, the Advisory Committee clearly contemplated the scope and sources of record material that a reviewing court should consider, and rejected the narrow position embraced by the court

of appeals in this case. The court of appeals here gave no weight at all to that persuasive commentary.[10]

This case presents an appropriate vehicle for this Court to decide the scope of the record that a court of appeals may review in determining whether a Rule 11 error affected a defendant's substantial rights. The facts of this case well demonstrate the deficiencies of the Ninth Circuit's anomalous rule. Respondent, assisted by counsel, was clearly advised at both his initial appearance and his arraignment that his right to counsel extended to all stages of the case. He also signed an acknowledgment of rights form in which he was again informed of that right, and his counsel attested to his reasoned belief that respondent was familiar with, and understood, the rights explained in that acknowledgment. The court of appeals nevertheless refused even to consider that record evidence in assessing whether respondent's "substantial rights" were affected. There is no reason for the court of appeals to refuse to consider such probative evidence on the question of prejudice.[11]

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[10] While Advisory Committee notes accompanying promulgation of a Federal Rule are "not determinative" of the meaning of that Rule, this Court has long held that those notes are "of weight" in the Court's construction of a Federal Rule. *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988) (quoting *Mississippi Publ'g Corp.* v. *Murphree*, 326 U.S. 438, 444 (1946)); see also *United States* v. *Hyde*, 520 U.S. 670, 676-677 (1997) (relying on advisory committee's note (1983 Amendment) accompanying Fed. R. Crim. P. 32(e)); *United States* v. *Sells Eng'g, Inc.*, 463 U.S. 418, 428-429 (1983) (relying on advisory committee's note accompanying Fed. R. Crim. P. 6(e)).

[11] As the government noted in its rehearing petition, respondent's initial appearance and arraignment proceedings were not transcribed until after the court issued its initial opinion in this case. As a result, the government moved to supplement the record

3. The court of appeals' decision raises matters of significant and recurring importance to the continued efficient administration of the criminal justice system—a system that, this Court has recognized, relies heavily on guilty pleas. See *Santobello* v. *New York*, 404 U.S. 257, 260 (1971) (describing plea bargaining as "an essential component of the administration of justice"); cf. *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977) ("[T]he fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system."). Indeed, the vast majority of criminal cases in the federal system are resolved by guilty plea.[12]

The enactment of Rule 11 was an important step towards standardizing the plea process and ensuring that guilty pleas satisfy constitutional standards. Nonetheless, it remains regrettably the case that dis-

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with those materials when it filed its rehearing petition. As respondent acknowledged below, "all these transcripts were in the district court record." See Resp. Opp. to Pet. for Reh'g 3 n.1. The court of appeals did not formally rule on the government's motion to supplement the record. It appears that the court of appeals considered that motion to be moot or irrelevant in light of its decision, on rehearing, that it could not consider any information other than the transcript of the guilty plea hearing to determine whether respondent had been prejudiced by the Rule 11 error. App., *infra*, 6a-7a ("Thus, we cannot consider the government's claim that [respondent] learned of his right to counsel during earlier court proceedings.").

[12] Statistics compiled by the Department of Justice indicate that, in Fiscal Year 1999, 62,418 defendants in federal court were convicted upon a guilty plea, or 94.5% of the total number of 66,055 convicted; in Fiscal Year 1998, 56,896 defendants were convicted upon a guilty plea, or 93.3% of the total number of 60,958 convicted; and in Fiscal Year 1997, 52,514 defendants were convicted upon a guilty plea, or 92.8% of the total number of 56,570 convicted.

trict courts do not always comply with the requirements of Rule 11 with the utmost strictness. Sometimes courts fail to provide all of the information required by Rule 11 even when, as in this case, the prosecutor brings that omission to the attention of the court. It is necessary, therefore, for the courts to develop a fair and efficient system for addressing claims of Rule 11 error, just as for addressing other claims of error that arise in the trial court. A properly limited standard of appellate review for claims of error not raised at trial also prevents the government from suffering unfair surprise when a mistake could have been rectified in the trial court had it been brought to that court's attention.

The application of a plain-error standard here, as in other contexts, would promote important interests in judicial economy and fairness by appropriately raising the appellate review bar in cases where counseled litigants fail to object to a claimed Rule 11 error. As the facts of this case illustrate, a contemporaneous objection by respondent's counsel might well have cured the resulting defect. Indeed, respondent's counsel had specific notice at the second plea hearing of the possibility of a Rule 11 error, in light of the prosecutor's statement in open court and the court's admission that it had not given an advisement about counsel because it did not believe one was necessary. Counsel's failure to lodge a timely objection on that point thus warrants the application of the more rigorous plain-error standard of review. And any review of the impact of the Rule 11 error should be considered on a full record, so that a just determination can be made whether respondent's guilty plea should stand despite the trial court's error. The Ninth Circuit's position that appellate review must

be conducted on a truncated record warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-50385

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ALPHONSO VONN, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Central District of California; James M. Ideman, District Judge, Presiding
D.C. No. CR-97-00233-JMI

Argued and Submitted: Sept. 16, 1999
Filed: Sept. 14, 2000

ORDER

The opinion filed April 20, 2000, and reported at 211 F.3d 1109, is withdrawn and superseded by the attached opinion. The petition for rehearing is otherwise denied.

OPINION

Before: BROWNING, KOZINSKI and WARDLAW, Circuit Judges.

KOZINSKI, Circuit Judge:

We consider whether we must set aside a guilty plea because the district court failed to advise defendant of his right to be represented by counsel at trial.

I

On February 27, 1997, three men entered the Farmers and Merchants Bank in Long Beach, California, and attempted a daring, if ill-conceived, daytime robbery. After announcing "[t]his is a holdup," two of the robbers drew guns and instructed everyone to get on the floor. The third man, Vonn, leapt over the counter with a bag for the tellers to fill with money. The three men then fled with a grand total of $209, proving yet again that crime doesn't pay. Adding injury to insult, the three were arrested a short time later and police recovered the entire booty from Vonn's sock.

Vonn was initially charged with armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) and chose to plead guilty. As required by Rule 11(c) of the Federal

Rules of Criminal Procedure, the court informed Vonn of the rights he was relinquishing: the right against self-incrimination, the right to trial by jury, the right to confront witnesses and the right to present evidence in his own behalf. Absent from the litany of Rule 11(c) rights ticked off by the district court was the right to counsel at trial. *Cf.* Fed. R. Crim P. 11(c)(3).

The government then filed a superseding indictment charging Vonn with conspiracy to commit bank robbery in violation of 18 U.S.C. § 371 and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). Vonn pleaded guilty to these additional charges and the court again instructed him as to the rights he was giving up. Again, the district judge failed to inform Vonn of his right to an attorney at trial as required by Rule 11(c)(3). This time the government attempted to point out the court's error:

Ms. Lu (for the government):	Your Honor?
The Court:	What?
Ms. Lu:	If we could—I don't know remember hearing the Court inform the defendant of his right to assistance of counsel.
The Court:	I didn't because [he] is represented by counsel.

Reporter's Transcript of Proceedings, Change of Plea at 10-11.

Vonn subsequently moved to withdraw his guilty plea on the gun charge, arguing that he was not guilty

and his plea was the result of a mistake. The court denied Vonn's motion. In the Presentence Report, Vonn's probation officer recommended a prison term at the low end of the spectrum given "the minimal loss and [Vonn's] lack of criminal history." Vonn was sentenced to a total of 97 months. On appeal, he seeks to have all of his convictions set aside due to the district judge's failure to advise him of his right to counsel at trial.[1]

II

According to Rule 11, prior to accepting a guilty plea, "the court *must* address the defendant personally in open court and inform the defendant" of his rights. Fed. R. Crim. P. 11(c) (emphasis added). The Rule then goes on to list the specific rights the court must explain to the defendant. If the district court fails to properly advise a defendant of his rights under Rule 11(c), we typically allow him to withdraw his guilty plea. *See United States v. Odedo*, 154 F.3d 937, 939 (9th Cir. 1998) (holding that where "the district court violated the requirements of Rule 11" it was "necessary to remand so that [defendant] has the opportunity to enter a new plea").

The government has all but conceded that the requirements of Rule 11 were not satisfied here. *See* Appellee's Brief at 1 (posing the issue presented as "[w]hether . . . the district court's failure explicitly to advise (sic) defendant of his right to the continued

[1] Vonn also claims the district court erred in failing to warn him that statements he made in the change of plea hearing could be used against him in a future perjury prosecution. Because we find the failure to advise him of the right to counsel to be dispositive, we need not address this claim.

assistance of counsel at trial affected defendant's substantial rights"). Nevertheless, the government offers two arguments as to why Vonn ought not be allowed to withdraw his guilty plea. The first is that he is precluded from raising his Rule 11 claim with respect to the firearms charge because he failed to raise it below in his motion to withdraw the plea. Second, the government argues that the district court's failure to adhere strictly to the requirements of Rule 11(c)(3) was harmless error.

A. Waiver

The government correctly points out that we do not normally consider issues raised for the first time on appeal. *See United States v. Rubalcaba*, 811 F.2d 491, 493 (9th Cir. 1987) (refusing to "consider the merits" because defendant "failed to raise this claim below in his motion to withdraw his plea . . . [and] fail[ed] to satisfy any . . . exceptions"). However, we have held that this does not apply to Rule 11 errors. Instead, Rule 11 has its own review mechanism, which supersedes the normal waiver rule. *See Odedo*, 154 F.3d at 940, ("[T]he Rule 11(h) 'harmless error' standard applies to all Rule 11 errors, regardless of whether they were ever raised before the district court.").[2] Thus, the

[2] We note, moreover, that accepting the government's waiver argument would create a curious anomaly: We would be precluded from considering the failure to caution defendant of his right to counsel on the gun charge, as to which he made a motion to withdraw the plea (but failed to raise the rule 11 argument), but we would not be precluded from considering the issue with respect to the remaining counts, as to which defendant made no motion to withdraw the plea.

case turns on our resolution of the government's second argument, that the district court's error was harmless.

B. Harmless Error

Under Rule 11(h), we must disregard variances from the colloquy that do not "affect substantial rights." Fed. R. Crim. P. 11(h). We have interpreted this to mean that we must inquire whether the defendant was aware of his rights despite the judge's failure to advise him. *See United States v. Graibe*, 946 F.2d 1428, 1435 (9th Cir. 1991) (requiring that government make "an affirmative showing on the record that the defendant was actually aware of the advisement" for the error to be harmless).

In determining what the defendant knew, "we are limited to what the record of the plea proceeding contains." *Id.* at 1434. The requirements of Rule 11 are so easy to follow that we will not go beyond the plea proceeding in considering whether the defendant was aware of his rights. *See Odedo*, 154 F.3d at 940 ("Our review is limited to the record of the plea proceeding."); *United States v. Gastelum*, 16 F.3d 996, 999 (9th Cir. 1994) ("This requirement ensures that a defendant is fully aware of his rights *when his plea is entered*—that he is aware of them *at the time they are being waived.*"); *United States v. Kennell*, 15 F.3d 134, 138 (9th Cir. 1994) ("In making the critical inquiry into what Kennell actually knew at the time he entered his plea, we are limited to the contents of the record of the plea proceeding.").[3] Thus, we cannot consider the government's

[3] *United States v. Dawson*, 193 F.3d 1107 (9th Cir. 1999), distinguished *Gastelum*, 16 F.3d 996, on the grounds that the court might look beyond the plea proceeding on habeas review, even though it would not on direct appeal. *See Dawson*, 193 F.3d at 1110. While we are not convinced the distinction makes sense, our case falls on the *Gastelum* side of the line.

claim that Vonn learned of his right to counsel during earlier court proceedings.

The government suggests that the Assistant United States Attorney's reminder to the district court during the plea proceeding alerted the defendant to his right to assistance of counsel at trial. *See* p. 1154 [3a], *supra*. We sympathize with the government's position and recognize its good faith effort to correct the district court's error. However, the transcript of the government's attempted correction does not yield the unequivocal evidence we would need before we could deem Vonn aware of his continuing right to counsel at trial.

The prosecutor's statement was elliptical at best: "If we could—I don't know remember hearing the court inform the defendant of his right to assistance of counsel." Reporter's Transcript of Proceedings, Change of Plea at 10-11. For those familiar with the legal system, the import of the lawyer's statement is apparent: She was reminding the district court of defendant's right to representation of counsel at trial. However, for an inexperienced criminal defendant, the statement could be baffling, as it does not mention the availability of counsel at trial. And the district court's response to the government's reminder, "I didn't because [he] is represented by counsel," *id.* at 11, might confuse even an experienced criminal defendant. We cannot assume that Vonn understood the point of the government's objection.

The government also relies on cases from other circuits which appear to hold that a defendant who is represented by counsel at his plea hearing, is presumed to be aware of his right to counsel at trial. *See, e.g., United States v. Gomez-Cuevas*, 917 F.2d 1521, 1526 (10th Cir. 1990) ("[T]here was no prejudice in the court's failure to advise Gomez he had a right to counsel because Gomez already was represented by counsel."); *United States v. Lovett*, 844 F.2d 487, 491 (7th Cir. 1988) ("Lovett was represented by an attorney. Therefore, the district court was not required to inform Lovett that even if he could not afford one, an attorney could be appointed to assist him at trial."); *United States v. Caston*, 615 F.2d 1111, 1113-15 (5th Cir. 1980) (harmless error where court failed to explicitly advise defendant of right to assistance of counsel at trial); *United States v. Saft*, 558 F.2d 1073, 1080 (2d Cir. 1977) ("[I]t would defy reality to suppose that Saft had any doubts" about his appointed counsel's continuing to represent him at trial, because unlike "a defendant with retained counsel who might worry that his money might run out . . . . there was no suggestion that [Saft's] counsel would abandon him if he went to trial.").

While language in these cases supports the government's position, most rely upon evidence outside of the plea proceeding.[4] This our precedent firmly precludes.

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[4] In *Lovett*, the court relied upon the defendant's prior dealings with the criminal justice system as suggesting his awareness of his right to counsel. *See Lovett*, 844 F.2d at 492 ("[T]here is no suggestion in the record that Lovett did not know about his right to counsel at trial . . . through his own extensive experience as a criminal defendant."). Likewise, Caston had been in the criminal justice system before and his experience supported the inference that he was familiar with his right to counsel at trial. *See Caston*, 615 F.2d at 1115 ("[Caston] was an experienced defendant. . . ."). Finally, in *Saft*, the court relied on evidence that the defendant was actually aware that his lawyer would continue to represent him at trial. *See Saft*, 558 F.2d at 1080 ("Saft's affidavit in support of his motion to withdraw his guilty plea stated that prior to the opening of serious plea discussions in September 1976, 'my attorney and I had looked forward to trial as the ultimate forum for proving that I am not guilty of the crimes charged.'"

See pp. 1155-56 [6a], *supra*. *Gomez-Cuevas* is the only case cited by the government where the fact that a defendant was represented at the plea hearing was deemed sufficient to support the inference that he knew of his right to counsel at trial. *See* 917 F.2d at 1526. However, it is also out of step with our case law, which requires "an affirmative showing on the record" that defendant was aware of his rights. *See Graibe*, 946 F.2d at 1435. Moreover, it is inconsistent with the structure of Rule 11. Subsection (c)(3) of the rule specifies the rights of which defendant must be advised even if he is represented by counsel, and this includes the right to counsel at trial. The drafters of the rule, thus, did not consider the admonition redundant simply because defendant is represented by counsel at the plea hearing.[5] The fact that a criminal defendant has been assigned a lawyer for a plea hearing does not, standing alone, absolve the district judge of his responsibility to advise the defendant of his continuing right to an attorney at trial under Rule 11(c)(3).

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[5] By contrast, subsection (c)(2) of the rule lists certain advisements that the court may omit if the defendant is already represented. *See* Fed. R. Crim. P. 11(c)(2).

CONCLUSION

Because the district court erred in advising Vonn of his rights under Rule 11(c)(3), and that error was not harmless, we vacate Vonn's sentence and guilty pleas and remand for further proceedings consistent with this opinion.

VACATED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-50385

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ALPHONSO VONN, DEFENDANT-APPELLANT

Appeal from the United States District
Court for the Central District of California
James M. Ideman, District Judge, Presiding
D.C. No. CR-97-00233-JMI

Argued and Submitted: Sept. 16, 1999
Filed: April 20, 2000

Before: BROWNING, KOZINSKI and WARDLAW,
Circuit Judges.

KOZINSKI, Circuit Judge.

We consider whether we must set aside a guilty plea because the district court failed to advise defendant of his right to be represented by counsel at trial.

I

On February 27, 1997, three men entered the Farmers and Merchants Bank in Long Beach, California, and attempted a daring, if ill-conceived, daytime robbery. After announcing "[t]his is a holdup," two of the robbers drew guns and instructed everyone to get on the floor. The third man, Vonn, leapt over the counter with a bag for the tellers to fill with money. The three men then fled with a grand total of $209, proving yet again that crime doesn't pay. Adding injury to insult, the three were arrested a short time later and police recovered the entire booty from Vonn's sock.

Vonn was initially charged with armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) and chose to plead guilty. As required by Rule 11(c) of the Federal Rules of Criminal Procedure, the court informed Vonn of the rights he was relinquishing: the right against self-incrimination, the right to trial by jury, the right to confront witnesses and the right to present evidence in his own behalf. Absent from the litany of Rule 11(c) rights ticked off by the district court was the right to counsel at trial. *Cf.* Fed. R. Crim P. 11(c)(3).

The government then filed a superseding indictment charging Vonn with conspiracy to commit bank robbery in violation of 18 U.S.C. § 371 and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). Vonn pleaded guilty to these additional charges and the court again instructed him as to the rights he was giving up. Again, the district judge failed to inform Vonn of his right to an attorney at trial as

required by Rule 11(c)(3). This time the government attempted to point out the court's error:

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Vonn subsequently moved to withdraw his guilty plea on the gun charge, arguing that he was not guilty and his plea was the result of a mistake. The court denied Vonn's motion. In the Presentence Report, Vonn's probation officer recommended a prison term at the low end of the spectrum given "the minimal loss and [Vonn's] lack of criminal history." Vonn was sentenced to a total of 97 months. On appeal, he seeks to have all of his convictions set aside due to the district judge's failure to advise him of his right to counsel at trial.[1]

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[1] Vonn also claims the district court erred in failing to warn him that statements he made in the change of plea hearing could be used against him in a future perjury prosecution. Because we find the failure to advise him of the right to counsel to be dispositive, we need not address this claim.

II

According to Rule 11, prior to accepting a guilty plea, "the court *must* address the defendant personally in open court and inform the defendant" of his rights. Fed. R. Crim. P. 11(c) (emphasis added). The Rule then goes on to list the specific rights the court must explain to the defendant. If the district court fails to properly advise a defendant of his rights under Rule 11(c), we typically allow him to withdraw his guilty plea. *See United States v. Odedo*, 154 F.3d 937, 939 (9th Cir. 1998) (holding that where "the district court violated the requirements of Rule 11" it was "necessary to remand so that [defendant] has the opportunity to enter a new plea").

The government has all but conceded that the requirements of Rule 11 were not satisfied here. *See* Appellee's Brief at 1 (posing the issue presented as "[w]hether . . . the district court's failure explicitly to advise (sic) defendant of his right to the continued assistance of counsel at trial affected defendant's substantial rights"). Nevertheless, the government offers two arguments as to why Vonn ought not be allowed to withdraw his guilty plea. The first is that he is precluded from raising his Rule 11 claim with respect to the firearms charge because he failed to raise it below in his motion to withdraw the plea. Second, the government argues that the district court's failure to adhere strictly to the requirements of Rule 11(c)(3) was harmless error.

A. Waiver

The government correctly points out that we do not normally consider issues raised for the first time on appeal. *See United States v. Rubalcaba*, 811 F.2d 491, 493 (9th Cir. 1987) (refusing to "consider the merits" because defendant "failed to raise this claim below in his motion to withdraw his plea . . . [and] fail[ed] to satisfy any . . . exceptions"). However, we have held that this does not apply to Rule 11 errors. Instead, Rule 11 has its own review mechanism, which supersedes the normal waiver rule. *See Odedo*, 154 F.3d at 940, ("[T]he Rule 11(h) 'harmless error' standard applies to all Rule 11 errors, regardless of whether they were ever raised before the district court.").[2] Thus, the case turns on our resolution of the government's second argument, that the district court's error was harmless.

B. Harmless Error

Under Rule 11(h), we must disregard variances from the colloquy that do not "affect substantial rights." Fed. R. Crim. P. 11(h). We have interpreted this to mean that we must inquire whether the defendant was aware of his rights despite the judge's failure to advise him. *See, e.g., United States v. Dawson*, 193 F.3d 1107, 1110 (9th Cir. 1999) (approving district court's examination of defendant's "recent experience in other criminal cases, which suggested that he knew the rights

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[2] We note, moreover, that accepting the government's waiver argument would create a curious anomaly: We would be precluded from considering the failure to caution defendant of his right to counsel on the gun charge, as to which he made a motion to withdraw the plea (but failed to raise the rule 11 argument), but we would not be precluded from considering the issue with respect to the remaining counts, as to which defendant made no motion to withdraw the plea.

he waived by pleading guilty"); *United States v. Graibe*, 946 F.2d 1428, 1435 (9th Cir. 1991) (requiring that government make "an affirmative showing on the record that the defendant was actually aware of the advisement" for the error to be harmless).

What evidence is there that Vonn was aware of his right to counsel at trial, even though the district court neglected to inform him of it? The government points to the initial status conference where Vonn declared his intention to go to trial on the gun charge. According to the government, the discussion during the conference, set out in the margin,[3] indicates that all parties knew

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3

The Court:	Oh. Is that your understand [*sic*] Counsel? Do you and your client understand that the Government wants to pursue the gun allegation apparently?
Mr. Li:	Yes, I do, Your Honor—
The Court:	The Government's position is that Mr. Vonn personally used a firearm, right?
Ms. Lu:	Yes.
The Court:	And he doesn't want to admit that. So he would be admitting the armed bank robbery and admitting that somebody in the group used a gun but not necessarily it was he, right?
Mr. Li:	Yes, Your Honor. Can I have a moment, Your Honor?
The Court:	Yes.

(Pause in the proceedings)

Mr. Li:	We will proceed, Your Honor.

that Vonn would continue to be represented by Mr. Li, his appointed lawyer, at trial. Furthermore, according to the government, the district court informed both lawyers of the trial date, which should have made clear to Vonn that Mr. Li was to appear on his behalf at that time.[4]

Nothing in the transcript indicates that Vonn was aware of his continued right to counsel if he chose to go to trial. The district court did not mention that right,

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The Court:	Is there really any point in taking this plea? If we're going to go through a whole, the jury is going to have to hear the whole case anyway then to figure out whether or not he used a gun.
Mr. Li:	I understand, Your Honor. But it's my client's desire to plead guilty to Count One.

Reporter's Transcript of Proceedings, Status conference, Monday, May 12, 1997 at 3-4.

4

The Court:	Let's see. Jury trial is set for June 10th. We can just leave it on the calendar for June 10th, then, for trial.
Mr. Li:	Yes, your Honor.
Ms. Lu:	Very well.
The Court:	That will be the order then. The trial will remain as set for June 10th, on Count Two, and the sentencing date will remain as set by the Court. We'll see you back here on June 10th.

Reporter's Transcript of Proceedings, Status Conference, May 12, 1997 at 12-13.

nor did Vonn say anything, much less anything that clearly suggests he was aware of this right. The brief conference between Vonn and his lawyer, as the district court and government counsel watched, was off the record and we have no clue as to what was said between them. This hardly amounts to "an affirmative showing on the record that the defendant was actually aware of the advisement." *Graibe*, 946 F.2d at 1435.

The scheduling colloquy presents a closer question. Given some familiarity with how court proceedings are conducted, one would infer that when the court announces a future court appearance in the case, counsel are expected to be present unless specifically excused. But Vonn had no prior criminal record, nor do we have any indication that he was familiar with courtroom proceedings. We therefore cannot assume that he was aware of this convention. The district judge certainly did not say anything like, "I expect both counsel to be here on that date," nor would we expect him to do so, as counsel would know to be present without any such admonition. But the client is presumed *not* to know all the things counsel knows, which is why we have a Rule 11 colloquy. Based on this record, we cannot say with confidence that Vonn knew that he was entitled to be represented by counsel at trial despite the court's failure to advise him of this fact.

The government suggests that the Assistant United States Attorney's reminder to the district court alerted the defendant to his right to assistance of counsel at trial. *See* p. 1111-1112 [12a], *supra*. We sympathize with the government's position and recognize its good faith effort to correct the district court's error. However, the transcript of the government's attempted

correction does not yield the unequivocal evidence we would need before we could deem Vonn aware of his continuing right to counsel at trial.

The prosecutor's statement was elliptical at best: "If we could—I don't know remember hearing the court inform the defendant of his right to assistance of counsel." Reporter's Transcript of Proceedings, Change of Plea at 10-11. For those familiar with the legal system, the import of the lawyer's statement is apparent: She was reminding the district court of defendant's right to representation of counsel at trial. However, for an inexperienced criminal defendant, the statement could be baffling, as it does not mention the availability of counsel at trial. And the district court's response to the government's reminder, "I didn't because [he] is represented by counsel," *id.* at 11, might confuse an even more experienced criminal defendant. We cannot assume defendant here understood the government's attempted correction.

The government also relies on cases from other circuits which appear to hold that a defendant who is represented by counsel at his plea hearing, is presumed to be aware of his right to counsel at trial. *See, e.g., United States v. Gomez-Cuevas*, 917 F.2d 1521, 1526 (10th Cir. 1990) ("[T]here was no prejudice in the court's failure to advise Gomez he had a right to counsel because Gomez already was represented by counsel."); *United States v. Lovett*, 844 F.2d 487, 491 (7th Cir. 1988) ("Lovett was represented by an attorney. Therefore, the district court was not required to inform Lovett that even if he could not afford one, an attorney could be appointed to assist him at trial."); *United States v. Caston*, 615 F.2d 1111, 1113-15 (5th Cir. 1980) (harmless

error where court failed to explicitly advise defendant of right to assistance of counsel at trial); *United States v. Saft*, 558 F.2d 1073, 1080 (2d Cir. 1977) ("[I]t would defy reality to suppose that Saft had any doubts" about his appointed counsel's continuing to represent him at trial, because unlike "a defendant with retained counsel who might worry that his money might run out . . . . there was no suggestion that [Saft's] counsel would abandon him if he went to trial.").

While these cases use language that supports the government's position, most did not rely solely on the fact that defendant was represented at the plea hearing. In *Lovett*, there was other evidence that the defendant was aware of his right to counsel, including prior dealings with the criminal justice system. *See Lovett*, 844 F.2d at 492 ("[T]here is no suggestion in the record that Lovett did not know about his right to counsel at trial . . . through his own extensive experience as a criminal defendant."). Caston had been in the criminal justice system before and his experience supported the inference that he was familiar with his right to counsel at trial. *See Caston*, 615 F.2d at 1115 ("[Caston] was an experienced defendant . . . ."). Finally, in *Saft*, there was evidence that the defendant was actually aware that his lawyer would continue to represent him at trial. *See Saft*, 558 F.2d at 1080 ("Saft's affidavit in support of his motion to withdraw his guilty plea stated that prior to the opening of serious plea discussions in September 1976, 'my attorney and I had looked forward to trial as the ultimate forum for proving that I am not guilty of the crimes charged.'").

In Vonn's case, nothing other than the fact that he was represented by counsel at the plea hearing supports the inference that he was aware of his right to counsel at trial. Vonn has no criminal record and he made no statement that clearly disclosed his understanding that Mr. Li, his plea hearing lawyer, would continue to represent him if he chose to go to trial.

Gomez-Cuevas is the only case cited by the government where the fact that a defendant was represented at the plea hearing was deemed sufficient to support the inference that he knew of his right to counsel at trial. However, we consider it out of step with our case law which requires "an affirmative showing on the record" that defendant was aware of his rights. *United States v. Graibe*, 946 F.2d 1428, 1435 (9th Cir. 1991). Moreover, it is inconsistent with the structure of Rule 11. Subsection (c)(3) of the rule specifies the rights of which defendant must be advised even if he is represented by counsel, and this includes the right to counsel at trial. The drafters of the rule, thus, did not consider the admonition redundant simply because defendant is represented by counsel at the plea hearing.[5] The fact that a criminal defendant has been assigned a lawyer for a plea hearing does not, standing alone, absolve the district judge of his responsibility to advise the defendant of his continuing right to an attorney at trial under Rule 11(c)(3).

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[5] By contrast, subsection (c)(2) of the rule lists certain advisements that the court may omit if the defendant is already represented. *See* Fed. R. Crim. P. 11(c)(2).

CONCLUSION

Because the district court erred in advising Vonn of his rights under Rule 11(c)(3), and that error was not harmless, we vacate Vonn's sentence and guilty pleas and remand for further proceedings consistent with this opinion.

VACATED and REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA vs.	CR 97-233-JMI
Defendant's Name	
ALPHONSO VONN	CR 97-233(a)-JMI
Residence	Social Security No.
[REDACTED]	[REDACTED]
Address	Mailing Address
Los Angeles, CA 90044	[REDACTED]

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person, on:

6	22	98
Month/	Day/	Year

COUNSEL:___ WITHOUT COUNSEL However, the Court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the Court and the defendant thereupon waived assistance of counsel.

X WITH COUNSEL — Derek Li. DFPD (Name of Counsel)

PLEA: X GUILTY, and the Court being satisfied that there is a factual basis for the plea.

___ NOLO CONTENDERE

___ NOT GUILTY

FINDING: There being a finding/xxxxxxx of x GUILTY, defendant has been convicted as charged of the offense(s) of: Conspiracy in violation of 18 U.S.C. 371, as alleged in count 1 & Using a firearm during a crime of violence, in violation of 924(c), as alleged in count 3 of the first superseding Indictment in CR 97-233(a); Armed bank robbery in violation of 18 U.S.C. 2113(2)(d) as alleged in count 1 of the Indictment in CR 97-233.

JUDGMENT AND PROB./ COMMITMENT ORDER

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of: 37 months as to count 1 of CR 97-233 & count 1 of CR 97-233(a), said terms to be served concurrently with each other and 60 months as to count 3 of CR 97-233(a), to be served consecutively to the other term imposed for a total of 97 months. Upon release from imprisonment defendant shall be placed on supervised release for a term of 3 years, as to count 1 of CR 97-233 & counts 1 & 3 of CR 97-233(a), said terms to be served concurently with each other under the following terms & conditions: 1. Comply with the rules & regulations of the U.S. Probation Office & General Order 318; 2.

Refrain from any unlawful use of a controlled substance. Submit to one drug test within 15 days of release from imprisonment & at least two periodic drug tests thereafter, as directed by the Probation Officer; 3. If the amount of mandatory assessment imposed by this judgment remains unpaid at the commencement of the term of community supervision, defendant shall pay such remainder as directed by the Probation Officer; 4. Defendant shall submit his person & property to search & seizure by any law enforcement officer with or without a warrant at any time of the day or night for the rehabilitation & reformation of the defendant.

Pursuant to Section 5E1.2(f) of the Guidelines all fines are waived, including the costs of imprisonment & supervision, as it is found that defendant does not have the ability to pay.

Defendant is ordered to pay a special assessment of $300.00.

Defendant is given his rights on appeal.

Court recommends designation to a southern California facility to facilitate visitation by relatives.

Count 2 of CR 97-233(a), is dismissed in the interest of justice.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release set out on the reverse side of this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time

during the supervision period of within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

___ This is a direct commitment to the Bureau of Prisons, and the Court has NO OBJECTION should the Bureau of Prisons designate defendant to a Community Corrections Center.

Signed By: x U.S. District Judge /s/ JAMES M. IDEMAN
JAMES M. IDEMAN

SHERRI R. CARTER, CLERK

Dated/Filed Jun 29 1998 By /s/ illegible
Deputy Clerk

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this Judgment:

1. The defendant shall not commit another Federal, state or local crime;

2. the defendant shall not leave the judicial district without the written permission of the court or probation officer;

3. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5. the defendant shall support his or her dependents and meet other family responsibilities;

6. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7. the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

8. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

10. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

13. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to conform the defendant's compliance with such notification requirement;

15. the defendant shall not possess a firearm or other dangerous weapon;

16. the defendant shall, upon release from any period of custody, report to the probation officer within 72 hours.

These conditions are in addition to any other conditions imposed by this Judgment.

Supreme Court, U.S.
FILED
JAN 26 2001
CLERK

No. 00-973

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM 2001

UNTIED STATES OF AMERICA, PETITIONER

vs.

ALPHONSO VONN, RESPONDENT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Defendant, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, without prepayment of costs and to proceed in forma pauperis. The Office of the Federal Public Defender, by Deputy Federal Public Defender Derek Li, was appointed as counsel for Defendant in the trial court under the Criminal Justice Act, 18 U.S.C. § 3006A(b).

* * *

This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

EMILY S. UHRIG
Deputy Federal Public Defender

DATED: January 26, 2001

EMILY S. UHRIG
Deputy Federal Public Defender

No. 00-973

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM 2001

UNITED STATES OF AMERICA, PETITIONER

vs.

ALPHONSO VONN, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO GRANTING OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

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JANUARY TERM 2001

UNITED STATES OF AMERICA, PETITIONER

vs.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 224 F.3d 1152 (9th Cir. 2000) (J. Kozinski). The first opinion of the court of appeals, which was withdrawn on rehearing (Pet. App. 11a-22a), is reported at 211 F.3d 1109 (9th Cir. 2000).

JURISDICTION

The initial judgment of the court of appeals was entered on April 20, 2000. The judgment of the court of appeals on rehearing was entered on September 14, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

The government seeks certiorari on issues that it never litigated before the court of appeals and thus that Judge Kozinski's opinion never considered. Specifically, the government never argued on appeal that the court of appeals should evaluate Rule 11(c)(3) errors raised for the first time on appeal for plain error under Federal Rule of Criminal Procedure 52(b), rather than for harmless error under Rule 11(h). Instead, the government agreed that the court of appeals should evaluate such errors -- specifically, the Rule 11(c)(3) errors in respondent's guilty pleas to bank robbery and conspiracy -- for harmlessness under Rule 11(h). With respect to respondent's § 924(c) conviction, the government argued only that respondent had waived altogether the right to challenge his plea under Rule 11(c)(3) by not including that claim in the motion to withdraw his plea to that count that he made before sentencing. The government did not urge the court of appeals to apply plain error review.

Likewise, the government agreed with respondent that, to evaluate whether a Rule 11(c)(3) error is harmless under Rule 11(h), the court of appeals must assess whether the

defendant was otherwise aware of the constitutional right of which the district court failed to inform him at the time he pled guilty. Thus, the government's argument in its petition for certiorari -- that Rule 11(c)(3) errors raised for the first time on appeal should be evaluated for plain error under Rule 52(b) and that the proper test for assessing harmless error is to determine whether the error affected the defendant's decision to plead guilty -- directly conflicts with the positions it advocated before the court of appeals.

As a result, Judge Kozinski's opinion for the court of appeals never considered -- and thus provides no analysis on -- the applicability of a plain error standard of error and the definition of harmlessness under Rule 11(h), which the government now raises for the first time in its petition for certiorari. Accordingly, the issues were not properly preserved and developed and this case is not an appropriate one for Supreme Court review.

Moreover, the apparent circuit split the government identifies regarding the standard of review for Rule 11 errors first raised on appeal is of little effect. Regardless of whether the circuits attach plain error or harmless error to their analysis, the inquiry remains substantively the same: Does the record demonstrate that, despite the error, the defendant's plea was both knowing and voluntary? If the court of appeals cannot satisfy itself in the affirmative, in every circuit, it will vacate the plea and remand the case.

In addition, the government overstates the breadth of Judge Kozinski's opinion with respect to the scope of the court of appeals' review in assessing the harmlessness of Rule 11 errors. The court of appeals did not hold that in assessing the harmlessness of all Rule 11 errors, such as a defendant's knowledge of the potential consequences of his plea, it is limited to the plea colloquy. Indeed, such a holding would conflict with other, well-established Ninth Circuit

precedent and Rule 11's own advisory committee notes, which permit appellate assessment of all temporally relevant proceedings in evaluating the harmlessness of a Rule 11 error. Rather, the court of appeals held only that it is limited to the record of the plea proceeding in assessing whether a defendant was otherwise aware of a constitutional right of which the district court failed to advise him under Rule 11(c)(3). That is, all that is relevant in assessing whether a defendant knowingly relinquished his constitutional right to assistance of counsel at trial when he pled guilty is whether the defendant was aware of that right at the time of his plea, not months before or months later.

In light of the court of appeals' limitation of its holding to Rule 11(3)(3) errors -- that is, deficiencies in the constitutional advisements -- its decision in Vonn does not create a split between the Ninth and other circuits. Hence, the cases cited by the government in its petition to demonstrate a circuit split are inapposite.

Finally, the Ninth Circuit's decision in Vonn is too fact-specific to have ready application to other Rule 11 cases. This case lacks the traditional posture of Rule 11 appeals where a defendant challenges a conviction for the first time on appeal. Rather, two plea colloquies are at issue, to three counts, respectively, as well as a motion to withdraw a guilty plea to one of the counts to which respondent pled at the second proceeding. Indeed, part of the court's analysis -- its rejection of the government's waiver argument -- derives from the fact that respondent moved to withdraw his guilty plea to the firearm count. Moreover, in the second plea proceeding, the government actually objected to, and thus brought to the court's attention, the deficiency in the court's constitutional advisement under Rule 11(c)(3). Thus, the traditional rationale for applying plain error review is not at issue in this case: the government was not prejudiced by

respondent's failure to object because its objection gave the court the opportunity -- which it rejected -- to correct the error. The case is therefore not appropriate for Supreme Court review.

STATEMENT OF THE CASE

On March 14, 1997, respondent was charged in a two-count indictment with armed bank robbery, in violation of 18 U.S.C. § 2113(a)(d), and using and carrying a firearm during and in relation to that robbery, in violation of 18 U.S.C. § 924(c), respectively. Resp. C.A. Ex. Rec. 1-3. Two months later, on May 12, 1997, through court-appointed counsel, he informed the court that he wished to plead guilty to the bank robbery count but would go to trial on the firearm count. Resp. C.A. Ex. Rec. 12. Before accepting his guilty plea to the bank robbery, the court questioned respondent pursuant to Federal Rule of Criminal Procedure 11 but failed to advise him of his right to assistance of counsel at trial, as required by Rule 11(c)(3). Id. at 3-13. The court then continued the matter for sentencing on the bank robbery, and for trial on the remaining firearm count. Id. at 20-21.

On July 29, 1997, the government filed a superseding indictment, which charged respondent with one count of conspiracy to commit bank robbery, in violation of 18 U.S.C. § 371; one count of armed bank robbery and aiding and abetting, in violation of 18 U.S.C. §§ 2113(a) (d) and 2(a); and one count of using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). Id. at 4-9, 72. On September 3, 1997, respondent appeared before the district court to enter guilty pleas to the conspiracy and firearm counts. Id. at 25. In advising respondent of the constitutional rights he would waive by pleading guilty, the district court again failed to inform him of his right to assistance of counsel at trial. Id. at 29-30. This time, the government objected to the court's omission, stating that it did not

"remember hearing the Court inform the defendant of his right to assistance of counsel." Id. at 32-33; Pet. App, at 3a. The court replied: "I didn't because [he] is represented by counsel," id. at 33; Pet. App, at 3a, and thereupon accepted the guilty pleas to the conspiracy and § 924(c) charges.

On May 14, 1998, respondent moved to withdraw his guilty plea to the § 924(c) charge only, arguing that the plea lacked a factual basis. Resp. C.A. Ex. Rec. 58-59. The district court denied the motion. Id. On June 22, 1998, respondent was sentenced to 97 months' in prison. Pet. App., at 23a-24a.

On appeal, respondent challenged the validity of his guilty pleas on all three counts, in relevant part, on the ground that the district court erred under Rule 11(c)(3) by failing to ensure his understanding and voluntary waiver of his right to assistance of counsel at trial before accepting his guilty plea. Resp. C.A. Br. 15-21. With respect to the § 924(c) conviction, the government argued that respondent had waived his right to appeal the court's failure to advise him of his right to assistance of counsel at trial under Rule 11(c)(3) because he had not raised that issue in the motion to withdraw his plea that he filed with the district court. Pet. C.A. Br. at 18-21; Gov't C.A. Pet'n for Reh'g. at 7. The government urged the court of appeals to review the Rule 11(c)(3) errors pertaining to respondent's bank robbery and conspiracy convictions for harmless error under Rule 11(h). Pet. C.A. Br. at 22-43; Gov't C.A. Pet'n for Reh'g. at 8-11. The government noted that "Rule 11(h) was designed to import ordinary harmless error analysis, from Federal Rule of Criminal Procedure 52(a), into the Rule 11 context." Pet. C.A. Br. at 25. At no time did the government argue that the court of appeals should assess the Rule 11(c)(3) violations for plain error under Rule 52(b).

Moreover, the government agreed with respondent that the test for whether a Rule 11(c)(3) error is in fact harmless under Rule 11(h) is whether the record reveals that the "defendant had knowledge of the right about which the court failed to give notice." Pet. C.A. Br. at 33. See also id at 23, 34-43. At no time did the government argue, as it does now in its petition for certiorari, that the test for harmlessness should be whether the defendant still would have pled guilty if he had received the proper advisement. Instead, the government argued that the district court's failure to advise respondent of his right to assistance of counsel at trial before accepting his guilty pleas to all three counts was harmless error under Rule 11(h) because the record as a whole evinced his understanding of that right.

The court of appeals vacated the pleas and remanded the case for further proceedings. In so ruling, the court rejected the government's argument that respondent had waived his right to object to the adequacy of the constitutional advisements regarding his § 924(c) plea by not raising that objection in his motion to withdraw that plea. The court noted that Rule 11(h)'s harmless error test "supersedes the normal waiver rule" that precludes appellate review of issues raised for the first time on appeal. Pet. App. 15a. The court of appeals further noted the anomaly that would result if it accepted the government's position on appeal: "We would be precluded from considering the failure to caution defendant of his right to counsel on the gun charge, as to which he made a motion to withdraw the plea (but failed to raise the rule 11 argument), but we would not be precluded from considering the issue with respect to the remaining counts, as to which the defendant made no motion to withdraw the plea." Id. at 15a n.2.

With respect to respondent's Rule 11 challenges to his bank robbery and conspiracy convictions, the court of appeals did not take issue with the parties' position that those errors are

subject to harmless error analysis under Rule 11(h). Id. at 15a-22a. Thus, the court evaluated the Rule 11(c)(3) errors pertaining to all three guilty pleas for harmlessness error under Rule 11(h), which requires the court to "disregard variances from the colloquy that do not 'affect substantial rights.'" Id. In so assessing, the court applied the test as to whether respondent's substantial rights were affected that both the government and respondent urged: Was respondent otherwise aware of his right to assistance of counsel at trial despite the district court's failure to advise him of that right? Id. The court concluded that the record as a whole did not establish respondent's understanding of that right. Id. Therefore the district court's errors were not harmless. Id. at 22a.

The government filed a petition for rehearing and moved to supplement the record to include transcripts of respondent's initial appearance and arraignment proceedings at which he, together with all other defendants arraigned on that date, had been advised of his constitutional rights, including the right to assistance of counsel at trial, and an acknowledgment of his constitutional rights that he had signed at his arraignment. Gov't C.A. Pet. for Reh'g 1-11. The government argued the additional proceedings revealed respondent's knowledge of his right to assistance of counsel at trial at the time of his guilty pleas, two and six months later, respectively. Gov't C.A. Pet. for Reh'g 8-11. Respondent opposed the rehearing petition on the ground that the previous proceedings were irrelevant in assessing his understanding of his right to assistance of counsel at trial at the time he pled guilty to the charges months after those proceedings. Opp. to Gov't Pet. for Reh'g 4-13. Respondent argued that, in evaluating whether a defendant understood a constitutional right of which the district court failed to advise him at his plea proceeding, the court of appeals should be limited to the record of the plea proceeding. Id.

In its petition for rehearing, once again, the government did not challenge the court of appeals' application of Rule 11(h)'s harmless error analysis to Rule 11 errors raised for the first time on appeal. Nor did the government take issue with the court of appeals' understanding of what that inquiry entails: that a defendant's substantial rights are affected by an error under Rule 11(c)(3) -- and hence, that error is not harmless -- where he is not otherwise aware of the constitutional right he is waiving by pleading guilty, of which the district court fails to advise him.

The court of appeals withdrew its opinion and issued a revised one, which again vacated respondent's guilty pleas based on the Rule 11(c)(3) deficiencies. Pet. App. 1a-10a. The court left intact its analysis regarding the applicability of Rule 11(h)'s harmless error provision to plea colloquy deficiencies raised for the first time on appeal, in particular, where a defendant moved to withdraw his guilty plea but did not raise that error. Likewise, consistent with both parties' position throughout the appeal, the court again noted that the harmless error inquiry required it to assess "whether the defendant was aware of his rights despite the judge's failure to advise him." Id. at 6a.

But the court of appeals agreed with respondent that, for purposes of harmless error analysis, "[i]n determining what the defendant knew" regarding his right to assistance of counsel at trial, it was "'limited to what the record of the plea proceeding contains.'" Pet. App. 6a (quoting United Stated v. Graibe, 946 F.2d 1428, 1435 (9th Cir. 1991)). The court concluded that neither plea proceeding revealed respondent's understanding of his right to assistance of counsel at trial despite the district court's failure to advise him of that right. Id. at 7a-9a. Thus, the errors in both plea proceedings were not harmless. Id. at 10a.

DISCUSSION

1. THE GOVERNMENT SEEKS REVIEW OF ISSUES NOT PROPERLY PRESERVED IN THE COURT OF APPEALS.

The government asks this Court to review whether the court of appeals erred by evaluating the district court's failure to advise respondent regarding his relinquishment of his right to assistance of counsel at trial, as required by Rule 11(c)(3), under Rule 11(h)'s harmless error test, rather than under the plain error test set forth under Federal Rule of Criminal Procedure 52(b). Cert. Pet. at 12-16. Yet, the government never argued to the court of appeals that Rule 52(b)'s plain error test should be applied in evaluating whether the Rule 11(c)(3) errors at issue warranted vacation of the pleas. Pet. C.A. Br. at 18-45; Gov't C.A. Pet'n for Reh'g at 8. Indeed, with respect to respondent's guilty pleas to the bank robbery and conspiracy counts, the government argued the reverse: that the court of appeals should review those errors for harmlessness under Rule 11(h). Pet. C.A. Br. at 22-45; Gov't C.A. Pet'n for Reh'g at 8. With respect to respondent's guilty plea to the § 924(c) count, the government argued only that respondent had waived his right to appeal the validity of his guilty plea to the § 924(c) count by not raising the issue in a motion to withdraw that plea filed before sentencing and thus, that the court of appeals was barred from considering the argument at all. Pet. C.A. Br. at 18-21. See United States v. Olano, 507 U.S. 725, 733 (1993) (distinguishing waiver from forfeiture, noting "forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right'") (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Thus, at no time did the government argue that the court of appeals should evaluate

the errors under Rule 52(b)'s plain error test.[1] As a result, the court of appeals never had the opportunity to address the arguments the government now raises in its petition for certiorari. Thus, the record is not adequately developed on this issue and this case is not an appropriate vehicle for the Court's review.

Similarly, the government argues that the court of appeals erred by defining a Rule 11(c)(3) error as harmless under Rule 11(h) only where the plea colloquy record reveals that the defendant was otherwise aware of the constitutional right of which the district court failed to inform him. The government urges this Court to grant certiorari in order to adopt the Fifth Circuit's definition of harmless error articulated in United States v. Cuevas-Andrade, 232 F.3d 440 (2000). Specifically, the Fifth Circuit has held that, for purposes of harmless error review, "a defendant's substantial rights are affected if the district court's Rule 11 errors may reasonably be viewed as a material factor affecting the defendant's decision to plead guilty." Cuevas-Andrade, 232 F.3d at 443 (brackets and internal quotations omitted). But again, this position directly conflicts with the position the government advocated before the court of appeals, which Judge Kozinski's opinion ultimately adopted. See Pet. C.A. Br. 23 (Rule 11(c)(3) error "harmless if the record demonstrates that the defendant was aware of the necessary information at the time he entered his plea") (internal quotations omitted); Gov't C.A. Pet'n for Reh'g 8-9 ("the relevant inquiry is whether the defendant was aware of his rights despite the judge's failure

[1] In its petition for certiorari, the government argues that "[e]qually clearly, the court rejected the government's contention that respondent's failure to raise the claim in the district court amounted to a waiver (or, more accurately, a forfeiture) of that claim." Cert. Pet. 14. This assertion misrepresents the record: The government never asked the court of appeals to evaluate the district court's Rule 11(c)(3) errors for plain error under Rule 52(b). Thus, there was no "contention" to reject.

to advise him") (brackets omitted). Thus, once again, the court of appeals was deprived of the opportunity to consider the arguments the government now raises in its petition for certiorari.

Moreover, in the context of a Rule 11(c)(3) error, the government urges a distinction without a difference. In short, where the record does not reveal that a defendant understood he had the right to assistance of counsel at trial at the time he relinquished his right to trial by pleading guilty, a reviewing court cannot determine that the defendant would have pled guilty if he had understood that right. This is true because it would be impossible to ascertain that knowledge of such a crucial constitutional right would not have affected a defendant's decision to waive his right to trial.[2] For example, a defendant may believe he has a viable defense to the charges at issue but would be unable to present that defense to the court without the assistance of counsel. Under that circumstance, in effect, the defendant's plea would be coerced by his lack of knowledge of his right to counsel at trial. The only way that a court of appeals can be certain that the defendant's decision to plead guilty was unaffected by the district court failure to advise him of his right to assistance of counsel at trial is to determine that the defendant was otherwise aware of that right. Thus, in the context of the Rule 11(c)(3) error at issue in this case, the two standards for defining harmless error reduce to the same analysis.

[2] The government contends that "there may well be circumstances in which a court could conclude that the defendant was sufficiently determined to plead guilty even in the absence of the specific information omitted from the Rule 11 colloquy." Cert. Pet. 17 n.9. Interestingly, the government offers no examples of such a scenario. Indeed, such a scenario becomes utterly implausible in the context of the crucial role a defendant's knowledge of his right to assistance of counsel at trial plays in any decision to exercise the right to trial or to plead guilty.

2. THE CIRCUIT SPLIT REGARDING THE STANDARD OF REVIEW THAT APPLIES TO RULE 11 ERRORS RAISED FOR THE FIRST TIME ON APPEAL IS MISLEADING BECAUSE THE ANALYSIS APPLIED BY THE CIRCUITS IS VIRTUALLY IDENTICAL, REGARDLESS OF THE STANDARD OF REVIEW.

The government's petition contends that Judge Kozinski's opinion in Vonn "contributes to an existing circuit conflict on a question of significant and recurring importance to the federal criminal justice system." Cert. Pet. 11. The government contends that the First, Sixth, Seventh, and Eleventh Circuits apply plain error review to Rule 11 errors raised for the first time on appeal; (citing United States v. Gaudia-Maysonet, 227 F.3d 1, 5-6 (1st Cir. 2000); United States v. Bashara, 27 F.3d 1174, 1178-79 (6th Cir. 1994), cert. denied, 513 U.S. 1115 (1995); United States v. Cross, 57 F.3d 588, 590 (7th Cir.), cert. denied, 516 U.S. 955 (1995); United States v. Quinones, 97 F.3d 473, 475 (11th Cir. 1996)); and the Fifth, Ninth, and D.C. Circuits apply harmless error analysis, United States v. Odedo, 154 F.3d 937, 940 (9th Cir. 1998); United States v. Lyons, 53 F.3d 1321, 1322 n.1 (D.C. Cir. 1995); United States v. Glinsey, 209 F.3d 386, 394 n.8, cert. denied, 121 S. Ct. 282 (2000). Cert. Pet. 12-13.

But the government greatly overstates the nature and significance of this apparent difference in approach because, regardless of the standard attached to their respective analyses, in substance, all of the circuits conduct the same inquiry in assessing whether a Rule 11 error warrants reversal. This results from the unique appellate considerations involved in resolving a Rule 11 error, whether or not it is raised for the first time on appeal. Specifically, courts of appeals recognize that Rule 11 instructs the district courts in clear, specific terms to ensure the knowing and voluntary nature of guilty pleas. Where district courts are deficient in their

responsibilities under Rule 11, courts of appeals conduct a very fact-specific analysis to determine whether, despite the error, the defendant's decision to plead guilty was informed and voluntary. Where the record cannot provide such an assurance, the courts of appeals do not hesitate to vacate the plea in its entirety or remand the case for resentencing consistent with the advisements regarding the potential consequences of the plea that the defendant received when his plea was entered.

By their terms, Rule 11(h)'s harmless error provision and Rule 52(b)'s plain error provision set forth distinct standards of review. See Olano, 507 U.S. 725; Odedo, 154 F.3d at 940. Rule 11(h) derives from Rule 52(a), which provides that "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 52(b); Fed. R. Crim. P. 11(h), 1983 advisory committee notes. Rule 11(h) in turn provides that "[a]ny variance from the procedures required by [Rule 11] which does not affect substantial rights shall be disregarded." The government has the burden of establishing that such an error does not affect a defendant's substantial rights. See Odedo, 154 F.3d at 940. Rule 52(b)'s plain error analysis, on the other hand, allows a court of appeals to address an error that was not raised in the district court where the error is plain and affects the defendant's substantial rights. Olano, 507 U.S. at 732-734. Rule 52(b)'s inquiry is the same as that required for harmless error analysis except that "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Id. at 734-35.

But as applied in the Rule 11 context, whether described as plain or harmless error review, the circuits follow the same approach in assessing whether an error warrants vacating a guilty plea. In each case, the courts conduct a very fact-specific inquiry to determine whether the

record shows that the Rule 11 error compromised the knowing and voluntary nature of the plea by impacting the defendant's decision to plead or, in the case of a failure to advise a defendant of a constitutional right he waives by pleading, by depriving the defendant of knowledge of his waiver of that right. Indeed, the circuits tend to speak of "the record" in objective terms, as opposed to turning its analysis on who carries the burden of persuasion. The cases cited by the government as evidence of the supposedly different standards applied, in fact, best illustrate the commonality of the circuits' approach.

In Bashara, 27 F.3d 1174, the Sixth Circuit reviewed a Rule 11 challenge to a district court's failure to advise a defendant at his plea proceeding that he would face a five-year mandatory minimum prison term. The court stated it would review the case for plain error but then applied a straight, fact-specific Rule 11(h) analysis without mention of the defendant's apparent burden of persuasion. Id. at 1178-80. The court affirmed, finding that "under the totality of the circumstances of this case, [it could] not say that Bashara's substantial rights were violated by the district court's error when it neglected to advise him that he faced a minimum prison sentence of five years." Id. at 1180.

The Seventh Circuit conducted the same analysis in the Cross case; although it stated that it would review the Rule 11 error at issue for plain error, the court was silent regarding the defendant's apparent burden of persuasion in assessing whether the error was harmless under Rule 11(h), that is, whether the facts of the case compromised -- and hence warranted vacating -- the plea. Cross, 57 F.3d 588. Again, the court concluded that "[b]ecause the totality of the circumstances surrounding [the defendant's] plea shows that he tendered the plea of guilty voluntarily and without coercion, the district court's omission constituted harmless error." Id. at

588. See also Quinones, 97 F.3d 473, 475 (11th Cir. 1996) (applying plain error review of Rule 11 challenge based on failure to advise of nature of charge but vacating plea because "district court failed to satisfy the core objective that [the defendant] understand the nature of the charge against him").

The First Circuit adopts a somewhat different approach to evaluating Rule 11 errors raised for the first time on appeal. See Gandia-Maysonet, 227 F.3d 1 (1st Cir. 2000). In Gandia-Maysonet, the court of appeals reviewed a Rule 11 error raised for the first time on appeal for plain error but noted that it had to find not only that the defendant's substantial rights are affected but also that "the error has 'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.'" Id. at 5. Nonetheless, the court underscores that "[i]n the taking of a guilty plea under Rule 11, the critical concerns are that the plea be voluntary and that there be an admission, colloquy, proffer, or some other basis for thinking that the defendant is at least arguably guilty." Id. at 6. Thus, the court vacated the plea where the defendant had not been properly advised of the requisite scienter standard governing his offense. Id. at 6-7.

The cases that assess Rule 11 errors raised for the first time on appeal for harmless error reveal a remarkably similar inquiry.[3] In Odedo, 154 F.3d at 939, the Ninth Circuit emphasized

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[3] Many courts analyze Rule 11 errors raised for the first time on appeal under Rule (h)'s harmless error provision without even considering that plain error review might apply but, at the same time, without even mention of the government's burden of persuasion. Instead, the courts review the record to determine whether the error at issue compromised the knowing and voluntary nature of the guilty plea.

Indeed, in Vonn, the Ninth Circuit never stated that the government had the burden of persuasion on this issue. Cert. Pet. 6a. Nor, as discussed infra, did the court ever assess the possibility that plain error analysis should apply. Id. Instead, the court of appeals vacated respondents' guilty pleas because there was no showing on the record that he understood his right

that "Rule 11 places the obligation on the district judge to comply with the requirements of the rule in order to assure that the plea is knowing and voluntary. It is not a provision that requires the defendant to request the judge to make the inquiry or specify its form. Rule 11 provides the form of the inquiry that the judge is required to give." Thus, the court of appeals concluded that Rule 11(h)'s harmless error test applies to all Rule 11 errors, regardless of whether they were raised before the district court. Id. But in assessing the harmlessness of the error -- failure to advise the defendant of the nature of the charges under Rule 11(c)(1) -- the court again assessed the factual content of the record, in so doing concluding that there was no basis for finding that the defendant otherwise understood the charges to which he pled guilty. Id.

Similarly, in Lyons, 53 F.3d 1321, the D.C. Circuit considered the defendant's Rule 11 challenge to the district court's erroneous advisement during the plea colloquy of the potential

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to assistance of counsel at trial at the time he relinquished his right to trial by pleading guilty to the charges. Id. at 7a-10a.

Similarly, in United States v. Livorsi, 180 F.3d 76, 78-82 (2d Cir. 1999) , the Second Circuit assessed Rule 11 challenges raised for the first time on appeal for harmless error without mention of the applicability of plain error review. The defendant challenged the validity of his guilty plea based on the district court's failure to (1) advise him under Rule 11(e)(2) that, if the court rejected the government's recommendation under a plea agreement, he would be unable to withdraw his plea on that basis; and (2) inquire into whether he was on any medication or under a physician's care. Id. at 78-82. The court noted that a provision in a plea agreement advising the defendant of his inability to withdraw his plea should the court reject the recommendation suggested his awareness of this information. Id. at 81-82. At the same time, the defendant proffered the fact that he had been taking medication for several years due to a head injury and periodically suffered blackouts and amnesia. Id. at 82. In their aggregate, Second Circuit concluded the errors were not harmless. Thus, despite the fact that "plain error" was never part of its analysis, by viewing the evidence proffered by the defendant regarding his medical condition as critical to its decision to vacate the plea, the court implicitly held him to some burden of persuasion.

fine he would face by pleading guilty. (Despite the court's advisement of a $250 maximum fine, the actual maximum was $250,000 and it ultimately imposed a $135,000 fine. Id. at 1321.) In a footnote, the court of appeals noted that the absence of a contemporaneous objection did not trigger plain error analysis; rather, it would assess the error under Rule 11(h). Id. at 1322 n.1. But at the same time, the court's analysis in no way turned on who bore the burden of proof. Instead, in affirming after assessing the specific facts of the case, the court stated "[b]ecause the record as a whole makes clear that [the defendant] was not in fact misled, the error was not prejudicial and therefore not cause for reversal." Id. at 1322.

And in Glinsey, 209 F.3d at 394, the Fifth Circuit noted that it assesses Rule 11 errors raised for the first time on appeal for harmlessness under Rule 11(h), rather than plain error. But in its analysis of the actual harmlessness of the error at issue, the court implicitly placed the burden of persuasion on the defendant by requiring him to "show that the district court's variance affected his substantial rights." Id. at 394. Again, the court evaluated the facts to determine whether the error affected the defendant's decision to plead: he pled after being advised of the possibility of $1 million in fines but no receiving no warning regarding restitution; the court ultimately imposed restitution in excess of $1 million. Id. at 394-95. The Fifth Circuit reduced the restitution order to $1 million and concluded that his substantial rights were thus unaffected. Accordingly, regardless of the standard of review stated at the outset of its analysis, the court of appeals did what the other circuits have done: evaluated the record to determine whether the Rule 11 deficiency may have affected the defendant's decision to plead guilty.

In any event, despite the limited effect the differing standards of review have on the circuits' assessment of Rule 11 appeals, Judge Kozinski's opinion in Vonn follows the better rule

of law. (Again, despite the position it now takes in its petition for certiorari, the government never argued or even suggested to the court of appeals that plain error review should apply. See infra at 1-2, 5-8.) Rule 11's advisory committee notes make clear Congress's intent that appellate courts apply Rule 11(h) to any deficiency in a plea proceeding, regardless of whether the defendant objects to that deficiency before the court accepts his guilty plea. Specifically, Rule 11 adopts Rule 52(a)'s harmless error analysis as Rule 11(h). Most Rule 11 appeals raise deficiencies in guilty plea proceedings to which the defendant did not object in the district court.[4] Yet, despite Rule 11(h)'s extensive advisory committee notes, there is no reference to a defendant's need to make a contemporaneous objection to a Rule 11 error in order to invoke Rule 11(h)'s harmless error analysis. Likewise, the notes do not suggest that plain error review will apply where the defendant fails to make such an objection. If Congress had intended the courts to apply plain error analysis to these errors, it would have imported the text of Rule 52(b) as well as Rule 52(a) into Rule 11's provisions.

But regardless of the standard of review attached to the circuits' review of Rule 11 errors raised for the first time on appeal, courts are conducting the same analysis. Hence, Supreme Court resolution of this issue would not have a significant impact on appellate review of Rule 11

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[4] Indeed, respondent's case is an anomaly in this regard in that the government actually objected in the second plea proceeding to the district court's failure to advise respondent of his right to assistance of counsel at trial. Thus, the district court was on notice that its advisements were deficient. The court nonetheless misapprehended the requirements of Rule 11(c)(3) and concluded that respondent did not need to be advised of his "right to counsel" because he was already represented by counsel. Pet. App. 3a. More typically, where there is an objection to the integrity of a guilty plea, it is made after the plea is accepted, by a defendant's motion withdraw the guilty plea pursuant to Federal Rule of Criminal Procedure 32(e). See, e.g., United States v. Jones, 143 F.3d 1417, 1418 (11th Cir. 1998); United States v. Maher, 108 F.3d 1513, 1520 (2d Cir. 1997); United States v. Still, 102 F.3d 118, 123 (5th Cir. 1996).

errors raised for the first time on appeal. The government's petition for review on this issue should be denied.

3. THE GOVERNMENT OVERSTATES THE HOLDING IN VONN WITH RESPECT TO THE PROPER SCOPE OF APPELLATE REVIEW OF RULE 11 ERRORS; ANY EXISTING CIRCUIT SPLIT IS EXTREMELY SHALLOW

The government argues that the Ninth Circuit in Vonn "held that, in considering whether a Rule 11 error 'affect[ed] substantial rights' a reviewing court is confined to the four corners of the transcript of the plea colloquy proceeding, at least on direct appeal." Cert. Pet. 18. Based on that reading, the government then asserts that the court of appeals decision conflicts with "every other circuit that has considered this issue," which have "held that the transcript of the plea colloquy is but one part of the record that may be considered in assessing whether a Rule 11 error affected the defendant's substantial rights." Cert. Pet. 19 (citing Jones, 143 F.3d at 1420; United States v. Lovett, 844 F.2d 487, 492 (7th Cir. 1988); Maher, 108 F.3d at 1520-24; Lyons, 53 F.3d at 1322-23; United States v. Johnson, 1 F.3d 296, 302 (5th Cir. 1993) (en banc)).

Both contentions are wrong and divorce the language of Judge Kozinski's opinion from the context of the case, that is, the particular Rule 11 error at issue in Vonn. As discussed, the court of appeals faced only the question of the scope of its review in assessing the harmlessness of a district court's failure to advise a defendant of his right to assistance of counsel at trial, as required by Rule 11(c)(3). For the inquiry, the court held that only the contents of the plea proceeding are relevant. In short, what matters is not what the defendant may have understood months before or after he pled guilty but what he understood at the time he entered that plea and waived his right to trial. Pet. App. 6a-7a.

The court of appeals did not hold that the same limited scope applies to its assessment of the harmlessness of all Rule 11 errors. Indeed, such a holding would directly conflict with other Ninth Circuit precedent and the instructive language of Rule 11's advisory committee notes. See, e.g., United States v. Crawford, 169 F.3d 590 (9th Cir. 1999) (evaluated both plea and sentencing proceedings in concluding court's failure to advise defendant of mandatory restitution harmless error where defendant advised of possible fine in excess of amount of restitution actually ordered at sentencing); United States v. Chan, 97 F.3d 1582 (9th Cir. 1996) (evaluated both plea and sentencing proceedings in concluding district court's failure to advise defendant of inability to withdraw plea if court rejected government's recommendation was harmless because court accepted that recommendation; thus, defendant received what he bargained for); United States v. Rivera-Ramirez, 715 F.2d 453 (9th Cir. 1991) (evaluated plea and sentencing proceedings in concluding failure to advise defendant of minimum possible special parole term harmless error where defendant was advised of maximum life term of special parole and sentenced to life term of special parole following incarceration); United States v. Sanclemente-Bejarano, 861 F.2d 206 (9th Cir. 1988) (evaluated plea and sentencing proceedings in concluding failure to advise defendant of maximum penalty was harmless error where defendant was advised of possibility of penalty ultimately imposed); Rule 11, 1983 Advisory Committee Notes ("it is fair to say that the kinds of Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited, as in such instances the matter must be resolved solely on the basis of the Rule 11 transcript and the other portions (e.g., sentencing hearing) of the limited record in such cases") (internal quotations omitted).

Thus, the "split" between the Ninth and other circuits identified by the government is

illusory. Indeed, none of the cases cited by government demonstrate a circuit split regarding the scope of appellate review in assessing the harmlessness of Rule 11(c)(3) errors.

First, the government cites the Eleventh Circuit's decision in United States v. Jones, 143 F.3d 1417, 1420 (11th Cir. 1998), where the court considered the contents of a written plea agreement in assessing whether the defendant's substantial rights were affected by a Rule 11 deficiency in advising the defendant of the mandatory minimum sentence that would result from his conviction. Cert. Pet. 19. The Eleventh Circuit observed that "[w]hen reviewing a district court's Rule 11 plea colloquy to ensure that the three core principles of Rule 11 were not infringed, we rely 'solely on the basis of the record of the Rule 11 proceedings' . . . Thus, if the record of the plea colloquy does not show compliance with the three core principles of Rule 11, the defendant must be permitted to withdraw his plea." Id. at 1420. The court then concluded that the written plea agreement, filed with the district court at the plea hearing, was part of the record of that proceeding. Id. (internal citations omitted).

Similarly, the government cites the Second Circuit's decision in Maher, 108 F.3d 1513. Cert. Pet. at 19. But again the Ninth Circuit's decision in Vonn in no way conflicts with Maher. In Maher, the Second Circuit held that any deficiency in the district court's explanation of the nature of the charges was harmless because the record pertaining to the defendant's guilty plea demonstrated his understanding of those charges. Id. at 1524. Specifically, the court assessed the plea colloquy, as well as the contents of written plea agreements and written petitions to enter guilty pleas that were filed on the day of the plea proceeding. Id. at 1521-24. Thus, the court of appeals considered only the record pertaining to the plea proceeding. The court did not -- as the government urged the Ninth Circuit to do in Vonn -- consider any court proceedings not

temporally relevant to the defendants' understandings at the time they entered their respective guilty pleas.

The government also relies on Lovett, 844 F.2d at 492, where -- it contends -- the Seventh Circuit held harmless the district court's failure to advise the defendant of his right to assistance of counsel at trial in light of a written plea agreement. Cert. Pet. 19. But the government has misread the Lovett decision. In Lovett, the Seventh Circuit deemed harmless the district court's failure to advise the defendant of his right to assistance of counsel because the record of the plea colloquy otherwise demonstrated the defendant's knowledge of that right. Id. at 491-92 (noting district court explained that, at trial, defendant's "attorney could cross-examine the witnesses for the government, object to evidence offered by the government and offer evidence on [his] behalf"). The court noted also that "in any event, there is no suggestion in the record that Lovett did not know about his right to counsel at trial," because he had never alleged this lack of knowledge. Id. at 492.

The government's reliance on the Fifth Circuit's decision in Johnson, 1 F.3d at 302, is similarly misplaced. In Johnson, the court assessed the harmlessness of the district court's failure during the plea proceedings to inform the defendant of a one-year mandatory minimum that his conviction would invoke. Id. The court noted that it would conduct its review of a Rule 11 challenge "solely on the basis of the record on appeal--principally the transcript of the plea colloquy hearing but also other portions of the record, such as any written plea agreement, the transcript of the sentencing hearing, and the sentence actually imposed." Id. at 298. But the court cautioned that it would review post-plea colloquy sources only to the extent they are "temporally relevant to the voluntary and uncoerced nature of the defendant's guilty plea, and to

his knowledge and understanding of the nature of the charges and consequences of his plea." Id. (emphasis added). Thus, in light of the alleged Rule 11 error, which pertained to sentencing, the court assessed only the plea colloquy and sentencing proceeding. Id. at 299-302. The court concluded that the district court's failure to advise the defendant of the one-year mandatory minimum penalty before accepting his guilty plea was harmless in light of the fact that the plea colloquy revealed that he understood that his plea would result in a minimum sentence of 21 years' incarceration. Id.

Indeed, the only case cited by the government that reveals any divergence from the approach taken by the Ninth and other circuits, which permit consideration of only temporally relevant proceedings in evaluating the harmless of Rule 11 errors is the D.C Circuit's decision in Lyons, 53 F.3d 1321. But even in Lyons, the court's reliance on non-plea-related proceedings was minimal and not dispositive; indeed, the court justified such reliance on the fact that other factors also supported a finding of harmlessness. Id. at 1322-23 (harmless error in advising defendant of $250 maximum fine -- as opposed to actual $250,000 maximum fine -- where defendant properly advised of fine amount at arraignment and did not object to finding in presentence report of $250,000 maximum fine nor object or react with surprise at sentencing to imposition of $135,000 fine).

Accordingly, to the extent any split exists between the circuits in assessing the scope of its review of Rule 11 errors, it is extremely shallow. Indeed, considering the factual complexity of Rule 11 analysis and the myriad of factual and legal permutations thus posed in Rule 11 appeals, the circuits have adopted and applied a remarkably unified standard of analysis. Thus, Supreme Court review is unwarranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied based on (1) the government's failure to preserve the issues regarding the standard of review that applies to Rule 11 errors raised for the first time on appeal and the definition of "harmless error" under Rule 11(h); (2) the fact that, regardless of whether the circuits follow plain or harmless error review, the analysis reduces to the same inquiry; indeed, despite reviewing the Rule 11(c)(3) error at issue for harmlessness under Rule 11(h), the court of appeals in Vonn never cited the government's burden of persuasion in deciding to vacate the pleas; (3) the circuits are not split on the general issue regarding the scope of review in assessing the harmlessness of a Rule 11 error, in particular, a Rule 11(c)(3) error; and (4) the case is factually unique in that (a) the issues arise in the context of two guilty plea proceedings and a motion to withdraw the plea to one of the two counts to which he pled in the second proceeding, and (b) the government objected to the Rule 11(c)(3) error in the plea proceeding pertaining to two of the three counts and thus gave the court the opportunity to correct its mistake; hence, the traditional considerations that warrant plain error review are not at issue.

Respectfully submitted,

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Supreme Court, U.S.
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(2)

No. 00-973

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ALPHONSO VONN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

The Ninth Circuit has consistently adopted an approach to appellate review of errors in the guilty-plea colloquy required by Rule 11 of the Federal Rules of Criminal Procedure that is far more restrictive than the approach of most other circuits. Respondent argues that this Court should decline to resolve that circuit conflict because, in his view, the government did not properly preserve its positions below, the conflict is more apparent than real, and this case does not present a suitable vehicle for addressing those claims. Each of those contentions is incorrect.

1. *Standard of Review (Harmless Error or Plain Error).*

a. Respondent first contends (Br. in Opp. 1-2, 6, 9-11) that, because the government did not expressly argue to the court of appeals in this case that it should apply a plain-error, rather than harmless-error, standard, that issue is not preserved for this Court's review. That contention is incorrect.

This Court's "traditional rule" permits review of a claim when it was "pressed" *or* "passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992). The rule thus allows review "of an issue not pressed so long as it has been passed upon" by the court whose judgment is under review. *Ibid.*; see *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (rejecting claim that issue was not preserved when it was not raised below; "[i]t suffices for our purposes that the court below passed on the issue presented"); *Stevens* v. *Department of the Treasury*, 500 U.S. 1, 8 (1991). In this case, the court of appeals, citing its recent decision in *United States* v. *Odedo*, 154 F.3d 937, 940 (9th Cir. 1998), expressly decided that it would apply a harmless-error standard of review. See Pet. App. 5a. Because the

court of appeals thus passed on the standard of appellate review, that issue is properly presented for this Court's consideration.

Although in this case the government did not challenge *Odedo* as the controlling precedent in the court of appeals, that does not preclude the government from raising the standard-of-review issue in this Court. In *United States* v. *Williams*, this Court held that an issue is properly preserved for review on certiorari when, "although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent." 504 U.S. at 44-45. This case satisfies that requirement.[1] The government was not also obligated to "demand overruling of a squarely applicable, recent circuit precedent, even though that precedent was established in a case to which the [government] itself was privy and over the [government's] vigorous objection." *Id.* at 44. Such an additional requirement would be, as the Court stated in *Williams*, "unreasonable." *Ibid.*

Respondent also contends (Br. in Opp. 10-11) that the government did not argue below that the proper harmless-error inquiry for a Rule 11 violation is whether the district court's failure to comply with Rule 11 affected his decision to plead guilty. See Pet. 16-17. The court of appeals, however, clearly adopted the different rule that the inquiry into prejudice turns on "an affirmative showing on the record that

[1] In *Odedo*, as the court of appeals there noted, the government argued that, "because Odedo failed to raise his Rule 11 contention in the district court * * * it is 'waived,'" and the court interpreted that contention to mean that "it is the Government's contention that we must invoke a 'plain error' analysis for a 'forfeited error.'" *Odedo*, 154 F.3d at 939. The court of appeals then explicitly rejected that contention and concluded that departure from Rule 11 requires reversal unless the government demonstrates that the error was "harmless." *Id.* at 940.

defendant was aware of his rights." Pet. App. 9a (internal quotation marks omitted). Again, that position was consistent with the legal standard that the court had adopted in *Odedo*. 154 F.3d at 940. Thus, the court "passed upon" (*Williams*, 504 U.S. at 41) the showing that must be made to establish an effect on "substantial rights" from a Rule 11 error—an issue that is the subject of a circuit conflict. See Pet. 16. And if the correct standard of review in a case like this is the *plain* error standard, as we contend, a logical subsidiary issue is whether, in deciding whether a Rule 11 error affected the "fairness, integrity or public reputation of judicial proceedings," *United States* v. *Olano*, 507 U.S. 725, 732 (1993), a court should affirm when the defendant would have pleaded guilty even absent the Rule 11 violation. Because the plain-error question is properly before this Court, so is the subsidiary issue of its proper application.

b. There is no merit to respondent's contention (Br. in Opp. 11-19) that the difference between harmless-error and plain-error review in this context is of little significance. There are two significant differences. The first relates to the party that bears the burden of proof. The most frequent setting in which a Rule 11 violation will not affect substantial rights is when the defendant is aware of the omitted advice from another source. If the harmless-error standard applies, then the government bears the burden of proof in making that showing. See *Olano*, 507 U.S. at 734. The government will be at a significant disadvantage, compared to the defendant, in doing so, because the defendant best knows what advice he has received. Indeed, the showing required of the government will be particularly difficult, if not impossible, if the court of appeals restricts the scope of its review to the transcript of the plea proceeding, as the court did in this case (see Pet. App. 6a-7a). In contrast, if a plain-error standard applies, then the defendant bears the burden of proof to show an effect on his substantial rights—*i.e.*, that the error

"affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734.

The second important distinction between harmless-error and plain-error review is that plain-error review requires not only an effect on substantial rights, but also a basis for the court of appeals to exercise its discretion to correct the error. See *Olano*, 507 U.S. at 732 (court of appeals should exercise discretion to reverse for plain error only if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings") (punctuation altered). Even if a Rule 11 error were found to affect substantial rights, reversal would not be warranted under the discretionary aspect of plain-error review when the defendant acted knowingly and voluntarily and would have entered a guilty plea even had he been provided with the omitted information. See *United States* v. *Hoyle*, 2001 WL 8577, at *4 (1st Cir. Jan. 8, 2001). Contrary to respondent's contention (Br. in Opp. 11), there may well be cases in which the defendant cannot make a persuasive showing on that point—for example, where the guilty plea was unquestionably voluntary, and where the defendant was offered a highly favorable plea agreement or the case against the defendant was strong. When the district court omits a small part of the information required by Rule 11 in its colloquy, the defendant fails to object to that omission, and the factual basis for the guilty plea is compelling, there is little to commend vacatur of the plea.

Although respondent acknowledges that the courts of appeals have divided over the standard of review to be applied to claims of Rule 11 error not raised at trial, he contends (Br. in Opp. 14-18) that there has been little practical difference between the approaches followed by the "plain-error" and the "harmless-error" courts. That is incorrect. As respondent notes (*id.* at 16), all the courts of appeals do undertake a fact-specific review of particular records to determine whether the guilty plea should be vacated; but the

critical question is what the courts are looking for in making that record review, and on that point they have diverged significantly. The "plain-error" courts have generally asked whether the record shows some fundamental defect in the guilty plea, such as whether the plea was not knowingly and voluntarily made.[2] By contrast, the Ninth Circuit, applying a harmless-error standard, has found reversible error even where there is no reason to doubt that the defendant acted voluntarily and intelligently in making the guilty plea.[3] Indeed, it reversed in this case, even though the district court found, based on a colloquy with the defendant, that the plea was voluntary and intelligent and had a factual basis, see Resp. C.A. Ex. Rec. 26, 32, because the district court

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[2] See, *e.g.*, *United States* v. *Cross*, 57 F.3d 588, 591 (7th Cir.) ("Therefore, our review of Cross' plea is based on whether under the totality of the circumstances, the plea was voluntary and intelligent."), cert. denied, 516 U.S. 955 (1995); *United States* v. *Bashara*, 27 F.3d 1174, 1180 (6th Cir. 1994) (declining to vacate plea because "it cannot be said * * * that Bashara was 'affirmatively misled'" about his potential sentence), cert. denied, 513 U.S. 1115 (1995); see also *United States* v. *Quinones*, 97 F.3d 473, 475 (11th Cir. 1996) (plain-error review involves whether the district court "failed to address a core concern of Rule 11[:] * * * (1) ensuring that the guilty plea is free of coercion; (2) ensuring that the defendant understands the nature of the charges against him; and (3) ensuring that the defendant is aware of the direct consequences of the guilty plea").

[3] See *United States* v. *Kennell*, 15 F.3d 134, 135-137 (9th Cir. 1994) (vacating guilty plea under harmless-error standard where district court failed to advise defendant, as required by Rule 11(e)(2), that defendant could not withdraw his guilty plea if the court rejected government's sentencing recommendation, even though defendant had signed plea agreement advising him of that point, and even though district court made certain that the plea was voluntarily and intelligently made); *United States* v. *Graibe*, 946 F.2d 1428, 1432 (9th Cir. 1991) (also vacating guilty plea under harmless-error standard where district court failed to advise defendant that defendant could not withdraw his guilty plea if the court rejected government's sentencing recommendation, even absent showing that defendant was misled on that point).

failed to provide the defendant with a part of the advice required by Rule 11(c)(3).

c. Respondent suggests (Br. in Opp. 18 n.4) that this case is not a suitable vehicle for resolution of the proper standard of review because the prosecutor brought to the court's attention the possibility that the court had not fully complied with Rule 11(c)(3). Respondent contends that this was sufficient to alert the court to a mistake that should have been corrected and to avoid the application of the plain-error rule in the court of appeals. The court of appeals, however, concluded that the prosecutor's statement was "elliptical at best" because it referred only to respondent's right to *counsel*, not his right to *counsel at trial*, which is not the same thing.[4] See Pet. App. 7a.

Moreover, we are not aware of any authority for the proposition that such a statement by a *prosecutor* is sufficient to carry the *defendant's* burden to preserve a claim of error in the district court if the defendant makes no comment whatever. "Generally, the need to object, and thus to preserve an error for appeal is personal." Lissa Griffin, *Federal Criminal Appeals* § 4.2(5)(b) at 4-18 (2000). Indeed, as a general matter, a defendant may not raise on appeal a claim of error that only a co-defendant has preserved in the trial court.[5]

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[4] Compare Fed. R. Crim. P. 11(c)(2) (court must advise unrepresented defendant that he has "the right to be represented by an attorney at every stage of the proceeding") with Fed. R. Crim. P. 11(c)(3) (court must advise represented defendant that he has "the right to be tried by a jury and at that trial the right to the assistance of counsel").

[5] See *United States* v. *Warfield*, 97 F.3d 1014, 1024 (8th Cir. 1996) (failure to join co-defendant's objection to restriction of cross-examination), cert. denied, 520 U.S. 1110 (1997); *United States* v. *Hernandez*, 896 F.2d 513, 523 (11th Cir.) (failure to join co-defendants' motions for mistrial), cert. denied, 498 U.S. 858 (1990); *United States* v. *Palow*, 777 F.2d 52, 54 (1st Cir. 1985) (failure to join co-defendants' motions for severance), cert. denied, 475 U.S. 1052 (1986). Courts have

Especially in the context of a guilty-plea proceeding, a rule permitting a defendant to "vicariously object" based on a prosecutor's suggestion that the court had not complied with Rule 11 would be undesirable, for several reasons. First, the requirement that a defendant preserve a claim of error in the lower court promotes the adversary system, because it limits appeals to issues about which the defendant truly cares. If, by contrast, the defendant remains silent but then is permitted to raise the failure to comply with Rule 11 on appeal for the first time, the defendant will receive a windfall based on the diligence of another party to the case. Second, the strong societal interest in the finality of guilty pleas favors a rule that the defendant make some effort to challenge the validity of his plea in the lower court, so that a defendant is not induced to appeal merely because he is unhappy with the sentence that the district court imposes after accepting his guilty plea. Third, a defendant who pleads guilty will often have the opportunity to move to withdraw his guilty plea after the plea is accepted but before sentence is imposed, and thereby to bring the error again to the district court's attention as a possible basis for allowing him to replead. See Fed. R. Crim. P. 32(e) (authorizing district court to permit a guilty plea to be withdrawn before sentencing "if the defendant shows any fair and just reason"). If a defendant moves to withdraw his plea, then the district court can either permit him to replead or, if it declines to do so, can develop a record on the issue of prejudice for review by the court of appeals. In a case like this one, for example, a

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recognized an exception to that rule when the trial court expressly adopted a practice that an objection by one defendant applied to all defendants, see Griffin, *supra*, at 4-18 to 4-19, and some courts have also adopted a more lenient rule allowing defendants to press on appeal objections to evidence that were made at trial only by their co-defendants, see *id.* at 4-19. "However, with other types of error, where there is no evidence that the court applied the 'one-objection' practice, vicarious preservation will not be permitted." *Ibid.*

district court might conclude that it would not be "fair and just" to permit the defendant to withdraw his plea because the defendant had been informed, before pleading guilty, of all his constitutional rights attendant to a trial, or because the defendant would have entered a guilty plea even if the district court had fully complied with Rule 11.

2. *Scope of Record on Review.*

Although respondent acknowledges (Br. in Opp. 19) that the court of appeals ruled in this case that it would consider only the record of the plea proceeding to determine whether the district court's failure to comply with Rule 11 was harmless, he contends (*id.* at 20) that the Ninth Circuit has not followed such a flat rule in other cases, and (*id.* at 20-23) that the decision below does not, in any event, conflict with decisions of other circuits. Both contentions are incorrect.

The other Ninth Circuit decisions cited by respondent do not suggest that the court of appeals will consider matters outside the plea proceeding in determining whether a Rule 11 error affected the defendant's substantial rights. In three of those decisions, the Ninth Circuit held only that the district court's failure to give the defendant specific required advice at the plea proceeding was harmless in light of other advice that the court had given the defendant *at the same proceeding*.[6] In another case, the court merely reaffirmed

[6] In *United States* v. *Crawford*, 169 F.3d 590, 592 (9th Cir. 1999), the court failed to advise the defendant that he would be subject to mandatory restitution following his guilty plea, but the error was deemed harmless because the court did advise the defendant that he was subject to a fine well in excess of the amount of the restitution that was actually imposed. In *United States* v. *Sanclemente-Bejarano*, 861 F.2d 206, 210 (9th Cir. 1988), the court failed to advise the defendant that he would be subject to a term of supervised release following release from incarceration, but the error was deemed harmless because the court advised the defendant that he was potentially subject to a maximum life prison term. In *United States* v. *Rivera-Ramirez*, 715 F.2d 453, 458 (9th Cir. 1983), cert. denied, 467 U.S. 1215 (1984), the court failed to advise the defendant of the minimum special parole term he might be required to serve following his incarceration, but the error was deemed harmless because the court advised the defendant at the hearing that he might be subject to a life special parole term, which could convert to a life prison term if the parole terms were violated.

that it would not reverse a conviction based on a technical deviation from the requirements of Rule 11 where the defendant had clearly suffered no prejudice.[7] And the Ninth Circuit has also made clear in other Rule 11 contexts, beyond the failure to give all the advice required by Rule 11(c)(3), that it will not look beyond the record of the plea proceeding in making its harmless-error review. See *United States* v. *Kennell*, 15 F.3d 134, 137 (9th Cir. 1994) (district court's failure to advise defendant, as required by Rule 11(e)(2), that it was not bound by sentence recommendation in plea agreement, held not harmless, even though signed plea agreement itself informed defendant that court was not so bound); *Odedo*, 154 F.3d at 940 (court failed to inform defendant of nature of the charges against him, as required by Rule 11(c)(1); court of appeals limited its review "to the record of the plea proceeding at issue").

By contrast, the en banc Fifth Circuit, in *United States* v. *Johnson*, 1 F.3d 296 (1993), expressly rejected a rule limiting harmless-error review to "the plea hearing transcript," *id.* at 298 n.6, and held that it could review even matters in the record *after* the plea hearing, such as the transcript of sentencing, see *id.* at 302. The D.C. Circuit considered the transcript of the sentencing hearing in *United States* v. *Lyons*, 53 F.3d 1321, 1323 (1995), in ruling that the Rule 11 error in that case was harmless. While both courts recognized that the task before them was to determine whether the infor-

[7] See *United States* v. *Chan*, 97 F.3d 1582, 1584 (9th Cir. 1996) (although district court failed to advise defendant that it was not bound by terms of plea agreement and could impose a sentence higher than that recommended in the agreement, that error was harmless since court imposed the very sentence bargained for in the plea agreement).

mation omitted from the district court's advice to the defendant could have influenced his decision to plead guilty at the time he did so (see *Johnson*, 1 F.3d at 303; *Lyons*, 53 F.3d at 1323), the important point is that both courts did not confine themselves to the plea proceeding, even broadly defined, in performing that task. Those decisions therefore conflict with the Ninth Circuit's restriction of harmless-error review to the record of the guilty plea proceeding.

* * * * *

For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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QUESTIONS PRESENTED

1. Whether a district court's failure to advise a counseled defendant at his guilty plea hearing that he has the right to the assistance of counsel at trial, as required by Federal Rule of Criminal Procedure 11(c)(3), is subject to plain-error, rather than harmless-error, review on appeal when the defendant fails to preserve the claim of error in the district court.

2. Whether, in determining if a defendant's substantial rights were affected by a district court's deviation from the requirements of Rule 11(c)(3), the court of appeals may review only the transcript of the guilty plea colloquy, or whether it may also consider other parts of the official record.

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In the Supreme Court of the United States

No. 00-973

UNITED STATES OF AMERICA, PETITIONER

v.

ALPHONSO VONN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 224 F.3d 1152. A prior opinion of the court of appeals, which was withdrawn on rehearing (Pet. App. 11a-22a), is reported at 211 F.3d 1109.

JURISDICTION

The initial judgment of the court of appeals was entered on April 20, 2000. The judgment of the court of appeals on rehearing was entered on September 14, 2000. The petition for a writ of certiorari was filed on December 13, 2000, and was granted on February 26, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES INVOLVED

1. Rule 11(c) of the Federal Rules of Criminal Procedure, titled "Advice to Defendant," provides, in pertinent part:

> Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> * * * * *
>
> (3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination.

2. Rule 11(h) of the Federal Rules of Criminal Procedure, titled "Harmless Error," provides:

> Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

3. Rule 52 of the Federal Rules of Criminal Procedure, titled "Harmless Error and Plain Error," provides:

> **(a) Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

> **(b) Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Following guilty pleas, respondent was convicted in the United States District Court for the Central District of California on one count of conspiracy to commit bank robbery, in violation of 18 U.S.C. 371; one count of aiding and abetting armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d) and 18 U.S.C. 2; and one count of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). See Pet. App. 2a-3a. Respondent was sentenced to 97 months' imprisonment, to be followed by three years' supervised release. *Id.* at 24a-25a. The court of appeals vacated respondent's guilty pleas and sentence, and remanded for further proceedings. *Id.* at 10a.

1. On February 27, 1997, respondent was arrested on a criminal complaint that charged him and two others with armed bank robbery and with using and carrying a firearm during and in relation to a crime of violence. J.A. 12-13. On February 28, 1997, respondent made his initial appearance on the complaint. At that appearance, the magistrate judge advised the defendants who were present, including respondent, of their constitutional rights, including "the right to retain and to be represented by an attorney of your own choosing at each and every sta[g]e of the proceedings against you," and the right "to request that the Court appoint an attorney to represent you" if "you cannot afford an attorney." J.A. 15. Respondent orally confirmed that he had heard and understood his rights. J.A. 18. The magistrate then found that respondent was indigent

and appointed a Deputy Federal Public Defender to represent him. *Ibid.*

On March 14, 1997, a grand jury returned a two-count indictment charging respondent with one count of armed bank robbery, in violation of 18 U.S.C. 2113, and one count of using and carrying a firearm during and in relation to that robbery, in violation of 18 U.S.C. 924(c). J.A. 19-20. On March 17, 1997, respondent appeared in court, represented by appointed counsel, for his arraignment. The magistrate judge advised the defendants present, including respondent, of their constitutional rights, including the right "to be represented by counsel at all stages of the proceedings," and also advised the defendants that, "[i]f you don't have the money or means to hire an attorney, I will appoint an attorney to represent you without cost or expense to you." J.A. 22. Respondent's counsel then provided the court with respondent's signed "Statement of Defendant's Constitutional Rights," in which respondent acknowledged his constitutional right "to be represented by counsel at all stages of the proceedings against [him]." J.A. 25, 26, 28.[1] Respondent's counsel also signed a statement at the end of the form indicating that counsel was "satisfied that [respondent] has read this Statement of Rights * * * and that [he] understands them." J.A. 29. That document was filed with the court. J.A. 4.

At the conclusion of the arraignment, the court, through the clerk, asked respondent personally whether he had heard and understood the statements of the court "[p]ertaining to [his] rights and the

[1] Because of a broken arm, respondent could not actually sign his name on the form; instead, he marked the signature line with an "X." J.A. 25, 28.

appointment of counsel," and whether he had seen and signed the statement of rights form. J.A. 25. Respondent answered both inquiries in the affirmative. *Ibid.*

2. On May 12, 1997, at a status conference before the district judge, respondent, represented by the same court-appointed counsel who had represented him at his arraignment and at three earlier status conferences, indicated his intention to plead guilty to the bank robbery count and to proceed to trial on the firearms count. J.A. 35, 37. Respondent's counsel explained to the court that respondent's position was that he participated in the robbery but that, contrary to the government's contention, he did not use a firearm during the robbery. J.A. 35. The court then asked respondent's counsel, in respondent's presence, whether there was "any point in taking this plea" since "[t]he jury is going to have to hear the whole case anyway * * * to figure out whether or not he used a gun." J.A. 36. Respondent's counsel reiterated that "my client's desire [is] to plead guilty to [the bank robbery charge]." *Ibid.*

The court then proceeded to engage in a colloquy with respondent, as required by Federal Rule of Criminal Procedure 11, to ensure that respondent's guilty plea was voluntary and intelligent and was supported by a factual basis. During the course of that colloquy, the court advised respondent that, by pleading guilty, he would be giving up certain constitutional rights, including the right against self-incrimination, the right to a trial, the right to confront and cross-examine witnesses against him, and the right to present evidence in his own behalf at trial. J.A. 38-40. Respondent stated that he waived those rights. J.A. 40.

The court did not expressly tell respondent at that time, however, that if he proceeded to trial, he would have the right to the assistance of counsel at that trial. That omission contravened Federal Rule of Criminal Procedure 11(c)(3), which requires the court, before accepting a guilty plea, to inform the defendant that he has (among other rights) "the right to be tried by a jury and at that trial the right to the assistance of counsel." Respondent's counsel did not object to the omission. The court then accepted respondent's guilty plea to the bank robbery charge. J.A. 43.

At the conclusion of the hearing, the court informed counsel for both parties, in respondent's presence, that the firearm charge was scheduled for trial on June 10, 1997. J.A. 45; Pet. App. 17a n.4. On the day before trial was scheduled to take place, however, the court rescheduled it to August 12, 1997, because the attorneys in this case were then in the middle of another trial. J.A. 47. At the status conference at which the court rescheduled the trial, the court addressed respondent personally to confirm his understanding that his trial had been continued because of the attorneys' scheduling conflicts. *Ibid.*[2]

3. On July 29, 1997, the grand jury returned a three-count superseding indictment charging respondent with bank robbery (to which he had already pleaded guilty), using and carrying a firearm during and in relation to a bank robbery, and a new third count, charging conspiracy to commit bank robbery. J.A. 48-52. On August 4, 1997, respondent, assisted by counsel, pleaded not guilty to the conspiracy and firearm charges. At that time, defense counsel also requested and obtained from the court another continuance of the trial, to September 9, 1997. Gov't C.A. Ex. Rec. 51-52.

[2] The court's order holding the continuance to be excludable time under the Speedy Trial Act stated that, "although defendant Vonn and defendant Vonn's counsel were initially prepared to go forward with this case * * * on June 10, 1997, defense counsel is no longer available to try this case on [that date]." Gov't C.A. Ex. Rec. 42-43.

On September 3, 1997, at a hearing, respondent stated his intention to change his plea on the conspiracy and firearms counts to guilty. J.A. 54. The court then once again advised respondent that by pleading guilty he was giving up certain rights. J.A. 58. Again, however, the court omitted specific mention of respondent's right to the assistance of counsel at trial, should he choose to go to trial. After the court determined that there was a factual basis for the guilty pleas, the Assistant United States Attorney stated in open court that she did not "remember hearing the Court inform the defendant of his right to assistance of counsel." J.A. 61. The court responded that "I didn't because [he] is represented by counsel." *Ibid.*[3] Respondent's counsel raised no objection to the court's failure to advise respondent specifically of his right to the assistance of counsel at trial. Respondent then entered his plea of guilty on the conspiracy and firearm charges, and the court accepted the plea. Resp. C.A. Ex. Rec. 29.

[3] Federal Rule of Criminal Procedure 11(c)(2) provides that, before accepting a guilty plea from a defendant who "is not represented by an attorney," the court must advise the defendant that he has "the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant." Rule 11(c)(3) requires, in every case in which a defendant seeks to plead guilty, that the court must advise the defendant about the right "to the assistance of counsel" at trial. That requirement, which is at issue in this case, is not limited to unrepresented defendants.

4. On May 14, 1998, respondent moved to withdraw his guilty plea on the firearm charge only, on the ground that it lacked a factual basis. The district court denied the motion. J.A. 62-65. Respondent did not move to withdraw his guilty pleas to the other charges, nor did he invoke, as a basis for his motion to withdraw his plea to the firearms count, the district court's failure to advise him of his right to the assistance of counsel at trial. On June 22, 1998, respondent was sentenced to 97 months' imprisonment. Pet. App. 23a-24a.

5. On appeal, respondent argued for the first time that his guilty pleas on all three counts were invalid because, among other things, the district court had failed to advise him of his right to the assistance of counsel at trial, as required by Rule 11(c)(3), before accepting his guilty plea. The court of appeals found respondent's Rule 11(c)(3) claim "dispositive" (Pet. App. 13a n.1), and vacated respondent's guilty pleas (*id.* at 22a).

The court of appeals first observed that "[t]he Government correctly points out that we do not normally consider issues raised for the first time on appeal." Pet. App. 15a. The court nonetheless rejected the government's argument that respondent had forfeited his claim of Rule 11 error. Rather, it held (*ibid.*) that the normal plain-error standard of review applicable to claims of error not raised at trial, as set forth in Federal Rule of Criminal Procedure 52(b), "does not apply to Rule 11 errors," and that "Rule 11 has its own review mechanism" in Rule 11(h), "which supersedes the normal waiver rule."[4] Therefore, the court stated,

[4] Rule 11(h) provides: "Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded."

the case turns on whether "the district court's error was harmless." Pet. App. 15a.

The court of appeals noted that Rule 11(h) requires the court to "disregard variances from the colloquy that do not 'affect substantial rights.'" Pet. App. 15a (quoting Fed. R. Crim. P. 11 (h)). According to the court, the "affect[ing] substantial rights" language of Rule 11(h) "mean[s] that we must inquire whether the defendant was aware of his rights despite the judge's failure to advise him." *Ibid.* Applying that standard, the court determined that the district court's error was not harmless because the record did not contain "unequivocal evidence" that respondent was aware that he had the right to the assistance of counsel at trial. *Id.* at 16a-21a. The court rejected the government's argument that the district court's statements at the May 12, 1997, status conference concerning the need for a jury trial on the firearm charge and the impending June 10, 1997, trial date (see p. 5, *supra*), demonstrated respondent's awareness that he would be represented by counsel at trial. *Id.* at 16a-17a & nn. 3-4. The court found those statements insufficiently clear to establish with confidence respondent's awareness that he would be represented by counsel at trial. *Id.* at 18a.

The court of appeals also noted that, at respondent's September 3, 1997, change of plea hearing, the prosecutor had drawn the district court's attention to the fact that it had not specifically advised respondent of his right to counsel at trial. The court of appeals "sympathize[d]" with the government's "good faith effort" to address that deficiency below, but it determined that the transcript "does not yield the unequivocal evidence we would need before we could deem [respondent] aware of his continuing right to counsel at trial." Pet. App. 18a-19a.

6. The government filed a petition for rehearing, in which it brought to the court's attention other parts of the record demonstrating respondent's awareness of his right to the assistance of counsel at trial. In particular, the government pointed to respondent's signed acknowledgment of his constitutional rights on March 14, 1997, as well as recent transcriptions of respondent's initial appearance and arraignment proceedings, at which respondent was specifically advised of his right to counsel at trial and stated that he understood his rights. Pet. for Reh'g 9-10; see pp. 3-5, *supra*. Respondent argued, in response, that the court was precluded from relying on those pre-plea materials under its prior decisions, which limited the scope of Rule 11(h) harmless-error review to the four corners of the guilty plea hearing transcript. Resp. Opp. to Pet. for Reh'g 10-11.

The panel withdrew its opinion and issued a new one, in which it again vacated respondent's guilty pleas based on the Rule 11 violation. Pet. App. 1a-10a. The court first reaffirmed that a defendant's claim, raised for the first time on appeal, that the district court failed to provide him with part of the advice of rights required by Rule 11(c)(3) is reviewed for harmless error, rather than plain error. *Id.* at 5a-6a. The court also reaffirmed that the harmless-error analysis requires it to determine "whether the defendant was aware of his rights despite the judge's failure to advise him." *Id.* at 6a.

The court then held, based on its prior decisions, that "we are limited to what the record of the plea proceeding contains" in conducting Rule 11(h) harmless-error analysis. Pet. App. 6a. Accordingly, the court stated, "we cannot consider the government's claim that [respondent] learned of his right to counsel during earlier court proceedings" in this case. *Id.* at 6a-7a.

After reaffirming its previous conclusion that the transcript of respondent's guilty plea hearing did not unequivocally demonstrate that respondent was aware that he had the right to counsel at trial (*id.* at 7a-9a), the court vacated respondent's guilty pleas and remanded the case for further proceedings (*id.* at 10a).

SUMMARY OF ARGUMENT

The court of appeals made three separate errors in assessing the effect on respondent's conviction of the district court's deviation from Rule 11(c)(3). First, the court of appeals erred in applying a harmless-error standard (which is applicable to preserved error) rather than a plain-error standard (which is applicable to claims, such as respondent's, that are raised for the first time on appeal). Second, the court of appeals applied an erroneous test for determining prejudice (under either the harmless-error or the plain-error standard), by asking only whether the defendant was aware of the information omitted from the Rule 11 colloquy from another source, rather than asking whether the error had an effect on the outcome of the proceedings; the court also erred by failing to reach the discretionary component of plain-error review, under which reversal for error is not warranted when the error did not affect the fairness, integrity, or public reputation of the proceedings. Third, the court of appeals erroneously conducted appellate review by looking only to the guilty plea record to determine whether the Rule 11 error required reversal, rather than conducting appellate review based on the entire district court record. Taking into account the entire record, it is clear that respondent was aware, from advice given at earlier court proceedings in this case, of his right to counsel at trial, which the district court erroneously failed to state

at the time of taking the plea. Accordingly, the Rule 11 error in this case had no effect on respondent's guilty plea and does not warrant reversal.

A. Because respondent did not raise in the district court any contention that that court failed to give him advice required by Rule 11(c)(3) before accepting his guilty plea, that contention may be reviewed in the court of appeals only for plain error. The principle that a party, including a criminal defendant, forfeits a claim of error if that claim is not properly presented to the trial court is a basic feature of our justice system. The "raise-or-forfeit" rule serves two complementary interests. First, it promotes judicial economy by ensuring that claims of error are brought to the attention of the trial court so that it may correct itself and prevent the risk that the entire proceeding will later be overturned. Second, it also prevents parties from manipulating the system by allowing courts to lapse into error without objection and then using that error to overturn an unfavorable result after the passage of time. Both interests are applicable in the context of a deviation from Rule 11(c)(3)'s requirement that the defendant be advised of his right to counsel at trial. If respondent's counsel had brought the district court's error to its attention, then that court might have corrected itself and provided the missing component of the advice required by the Rule. Similarly, if respondent had filed a timely motion to withdraw his plea on that ground, the district court could have developed a full record and the parties would have had the opportunity to assess the situation promptly. The raise-or-forfeit rule also prevents a defendant from raising a Rule 11(c)(3) error for the first time on appeal, after the government's evidence may have become stale

or merely because he was dissatisfied with the sentence that the district court imposed.

The only basis for appellate review of a forfeited claim in the federal system is found in Rule 52(b), which permits a court of appeals to notice plain error even if it was not raised below by the defendant. There is no exception to the requirements of Rule 52(b) for Rule 11(c)(3) errors. Rule 11(h), which permits appellate courts to disregard nonprejudicial deviations from the procedures of Rule 11, was intended to overturn prior practice under which a district court's deviation from Rule 11 required automatic reversal of a plea-based conviction without a showing of prejudice. Rule 11(h) rejected the automatic reversal rule, but it does not supersede Rule 52(b) or preclude the application of plain-error standards when the defendant failed to raise the issue below.

B. A district court's deviation from Rule 11(c)(3) constitutes plain error only if the defendant shows both that the error affected the defendant's "substantial rights" and that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. A showing that the error affected the defendant's substantial rights requires the reviewing court to assess whether the error has affected the outcome of the proceeding. Contrary to the Ninth Circuit's view, the reviewing court is not limited to asking whether the defendant was otherwise aware of the information that the district court omitted from its Rule 11 colloquy. Evidence that the defendant was otherwise aware of that information will ordinarily be sufficient to establish that the error did not affect his decision to plead guilty, but it is not necessary to a finding of harmless error. For example, a judge may, during the Rule 11 colloquy, understate the maximum sentence to which the de-

fendant is exposed, in violation of Rule 11(c)(1), but if the ultimate sentence imposed is well below the maximum term of which the defendant was advised, the Rule 11(c)(1) error is clearly harmless. Similarly, a defendant may have such great incentives to plead guilty (for example, pursuant to a plea agreement affording a substantial reduction in sentence) that it is clear that he would have entered the plea even if there had been no deviation from Rule 11. For that reason, the proper approach to harmless-error review in the Rule 11 context focuses on the effect that the error had on the ultimate outcome of the case. That approach is consistent with this Court's harmless-error and plain-error decisions, which (in both contexts) have determined whether an error affects substantial rights by asking whether the error influenced the result of the proceeding. That approach is appropriate here, because the procedures required by Rule 11(c)(3) are not constitutional rights in themselves, but are means intended to protect the constitutional requirement that any guilty plea be voluntary and intelligent. Thus, it is appropriate in the Rule 11 context to focus on the ultimate result of the proceeding.

The inquiry into plain error contains the additional requirement that, even if a defendant shows an effect on his substantial rights, reversal is not warranted unless necessary to protect the fairness, integrity, or public reputation of judicial proceedings. A court of appeals should not exercise its discretion to vacate the plea when the defendant's plea decision was not materially influenced by the error. Upsetting a plea-based conviction, often long after the fact, because of a violation of Rule 11 that did not have any material effect on the ultimate result of the case would undermine, rather than promote, the public perception of the fairness of the criminal process.

C. The court of appeals erred in determining the existence of prejudice solely by looking to the record of the guilty plea proceeding itself, and ignoring the entire record in the case. This Court has repeatedly explained that both harmless-error and plain-error review require consideration of the entire record in the case to determine whether a criminal defendant was prejudiced by a trial court's error. That principle applies in the guilty plea context when a defendant contends that he was prejudiced by the district court's departure from Rule 11(c). In some cases the record may demonstrate persuasively that the district court's omission had no effect on the outcome of the case. For example, the record may demonstrate that the error was of no import because the defendant had previously been provided with the omitted information by the district court or by counsel. There is no reason why a reviewing court should refuse to consider such highly relevant evidence when determining whether a failure to observe all the requirements of Rule 11(c)(3) affected the outcome of the proceeding.

D. Under the proper standards, the district court's failure to comply with Rule 11(c)(3) was not reversible error in this case. The record in this case shows that, before respondent entered his guilty pleas, he had already been informed of, and had acknowledged, his constitutional right to the assistance of counsel at trial. The departure from Rule 11(c)(3) thus omitted information that respondent, who pleaded guilty with counsel by his side, already knew. Thus, respondent cannot demonstrate that the district court's failure to provide him with the same information about that right

at his guilty plea hearing affected his decision to plead guilty.

ARGUMENT

THE DISTRICT COURT'S FAILURE TO ADVISE RESPONDENT, AS REQUIRED BY RULE 11(C)(3), OF HIS RIGHT TO THE ASSISTANCE OF COUNSEL AT TRIAL WAS NOT REVERSIBLE ERROR IN THIS CASE

A. The Omission Of Advice Required By Rule 11(c)(3) Is Reviewable Only For Plain Error If The Defendant Has Failed To Raise The Claim Of Error In The District Court

1. a. "No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (internal quotation marks omitted); *Daniels* v. *United States*, No. 99-9136 (Apr. 25, 2001), slip op. 7. As the Court has explained, the rule requiring a party to make a timely presentation of a claim of error in the trial court in order to preserve the claim for appeal serves two important purposes. First, the rule promotes judicial economy and efficiency by ensuring that the claim of error will be brought to the district court's attention at a time when that court may correct it. The rule thus reduces the likelihood that an error will jeopardize the entire judicial proceeding and require a retrial. See *United States* v. *Gagnon*, 470 U.S. 522, 529 (1985); *Luce* v. *United States*, 469 U.S. 38, 41-42 (1984); *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977).

Second, the rule diminishes the risk of unfair surprise and manipulation of the litigation by a party. It prevents parties from using their silence to allow the district court to pursue an erroneous course and then claim on appeal—after judgment has been entered, time has passed, memories have faded, and witnesses may have become unavailable—that the error requires reversal. See *Wainwright* v. *Sykes*, 433 U.S. at 89; *Luce*, 469 U.S. at 42; *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3 (1976).

b. The purposes of the "raise-or-forfeit" rule requiring a timely claim of error in the trial court are fully applicable in the context of a district court's failure to provide a defendant all the advice required by Rule 11(c)(3). First, requiring presentation of that claim of error to the trial court promotes judicial economy. If respondent's counsel had brought to the trial court's attention the fact that it had omitted part of the advice required by Rule 11, the court could have corrected itself immediately and thus precluded the possibility that the error would later lead to vacatur of the guilty plea on appeal and a remand for new proceedings.[5]

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[5] The defendant's obligation to bring the error to the trial court's attention is not lessened by the fact that conscientious prosecutors will also try to call Rule 11 error to the court's attention. Here, for example, the prosecutor told the court that she could not remember the court's having advised respondent of his right to *counsel*. See p. 7, *supra*. But she did not expressly refer to respondent's right to *counsel at trial*, which is not the same thing. Compare Fed. R. Crim. P. 11(c)(2) (court must advise an unrepresented defendant that he has "the right to be represented by an attorney at every stage of the proceeding") with Fed. R. Crim. P. 11(c)(3) (court must advise a represented defendant that he has "the right to be tried by a jury and at that trial the right to the assistance of counsel"). The court, moreover, erroneously told the prosecutor in response that it was not required to advise a counseled defendant that he had a right to counsel at trial, perhaps confusing Rule 11(c)(2) with Rule 11(c)(3). In these circumstances,

Indeed, even if respondent had raised his claim of error after the district court accepted his guilty plea but before it imposed sentence, that presentation of the claim would have promoted judicial economy by allowing the district court to make a determination, based on an adequate record, whether there was a "fair and just reason" to allow respondent to withdraw his plea under Federal Rule of Criminal Procedure 32(e). As the Seventh Circuit has recently observed, "[a] motion to withdraw a plea entered after defective procedures enables the district court to build the sort of record that is essential to understanding the effect of any noncompliance with Rule 11; it also permits the district judge to take the plea anew and thus avoid the delay that attends appeal—delay that may undermine the accuracy of any ensuing trial, for memories may fade or evidence be lost as time passes." *United States* v. *Driver*, 242 F.3d 767, 770 (2001); see also *United States* v. *Lopez-Pineda*, 55 F.3d 693, 697 (1st Cir.) (observing that the failure to raise a Rule 11 challenge before sentencing "denie[s] the government any opportunity to develop the district court record with a view to whether or not [the defendant] was misinformed"), cert. denied, 516 U.S. 900 (1995). A motion to withdraw the plea in the district court before sentencing also serves to "dispel [any] uncertainty about whether the defendant *really* wants to withdraw his plea, give up the consideration received for the plea bargain * * *, and go to trial." *Driver*, 242 F.3d at 770.

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an objection by defense counsel pointing out the difference between the two Rules might well have dispelled the confusion and led the court to make a proper advice of rights to respondent.

Second, applying the raise-or-forfeit rule to Rule 11(c)(3) violations also discourages unfair manipulation by defendants. In particular, it prevents defendants from attempting to withdraw their guilty pleas merely because they are unhappy with the sentence, even when they were fully aware at the time they entered their guilty pleas that the sentence might be lengthy or could not then be determined with certainty. In this case, for example, when respondent entered his first guilty plea, the court expressly advised him that it could not determine at that time what the sentence would be, and warned him that he would not be allowed to withdraw his guilty plea merely because he did not like the sentence. J.A. 39. The court gave respondent a similar warning before it accepted his second guilty plea. J.A. 57. But a rule allowing defendants in respondent's situation to raise a claim of Rule 11 error for the first time on appeal, without having to meet the plain-error standard, could be readily abused in a manner that would permit defendants to withdraw their guilty pleas merely because of second thoughts about the sentence.[6] A defendant might also seek, at some point after sentencing, to upset his plea because of changed circumstances that would make it more difficult for the government to prove guilt (such as the death or disappearance of witnesses). By facilitating such mani-

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[6] In many cases, defendants enter into guilty pleas pursuant to Rule 11(e)(1)(B), under which the prosecutor recommends a particular sentence, but that recommendation is not binding on the court, and the court must expressly advise the defendant that, even if it rejects the prosecutor's recommendation, the defendant nonetheless has no right to withdraw the plea. See Fed. R. Crim. P. 11(e)(2). The court of appeals' approach would allow such a defendant to seize on unpreserved error in the Rule 11 colloquy and obtain reversal motivated by unhappiness with the sentence.

pulations, the Ninth Circuit's approach tends to convert "the otherwise serious act of pleading guilty into something akin to a move in a game of chess." *United States* v. *Hyde*, 520 U.S. 670, 677 (1997).

2. a. The exclusive means for obtaining review on direct appeal of a trial court's error that the defendant failed to raise in the district court is set forth in Rule 52(b) of the Federal Rules of Criminal Procedure. Rule 52(b) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Rule 52(b) recognizes that a "rigid and undeviating" judicial practice of declining to review forfeited errors would be out of keeping with "the rules of fundamental justice." *Olano*, 507 U.S. at 732 (internal quotation marks omitted). Nevertheless, in light of the important purposes served by the requirement that claims of error be raised initially in the trial court, the authority created by Rule 52(b) to set aside criminal convictions based on plain error is "circumscribed," *ibid.*, and "to be used sparingly," *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982). See also *United States* v. *Young*, 470 U.S. 1, 15-16 (1985). To obtain relief under Rule 52(b), a defendant must show that there is an "'error' that is 'plain' and that 'affects substantial rights.'" *Olano*, 507 U.S. at 732; see *Johnson* v. *United States*, 520 U.S. 461, 467 (1997). In addition, "Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Olano*, 507 U.S. at 732 (quoting *Young*, 470 U.S. at 15); see *Johnson*, 520 U.S. at 467.

Despite this Court's statement in *Olano* that the raise-or-forfeit rule applies with respect to "any * * * sort" of error, see 507 U.S. at 731, the court of appeals declined to review respondent's claim under the plain-error standard. The court of appeals instead employed the standard of harmless error, which requires reversal unless the government shows that the error had no effect on the outcome of the proceeding. In so doing, it relied on Rule 11(h), which states that "[a]ny variance from the procedures required by [Rule 11] which does not affect substantial rights shall be disregarded." See Pet. App. 5a. The language of Rule 11(h) is similar to that of Rule 52(a), which sets forth the general harmless-error standard for claims of error that have been preserved by a timely objection.[7] The courts that have held that a Rule 11(c) violation must be reviewed under a harmless-error standard, even when a defendant failed to raise the claim of error in the district court, have relied principally on the similarity of language between Rule 11(h) and Rule 52(a). They have also noted that, although Rule 11(h) expressly provides that Rule 11 errors may be harmless, it does not on its face make any provision for plain-error review of claims not raised in the district court. Those courts have reasoned that, because Rule 11(h) is directed specifically at appellate review of Rule 11 errors, Rule 11(h) exclusively governs such claim of error, and Rule 52 has no operation at all.[8]

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[7] Rule 52(a) states: "Harmless error: Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

[8] See Pet. App. 5a ("Rule 11 has its own review mechanism, which supersedes the normal waiver rule."); *United States* v. *Odedo*, 154 F.3d 937, 940 (9th Cir. 1998); *United States* v. *Lyons*, 53 F.3d 1321, 1322 n.1 (D.C. Cir. 1995).

Contrary to that analysis, nothing in Rule 11(h) forecloses application of the plain-error standard of Rule 52(b) when a defendant fails to make a timely objection in the district court to a violation of Rule 11. Rule 11(h) merely provides that a violation of Rule 11 does not justify reversal when it is not prejudicial. It does not address the applicable standard of review when the defendant fails to preserve a claim in district court—an omission that regularly changes the standard of review to require a more demanding showing by the defendant. "Rule 11(h) does not override Rule 52(b) * * *; it simply restates the approach applicable when a claim of error has been preserved in the district court." *Driver*, 242 F.3d at 770. Like Rule 52(a) on which it it modeled, Rule 11(h) thus states the rule for review of preserved claims of Rule 11 error; but neither Rule 11(h) nor Rule 52(a) purports to displace the additional requirements of Rule 52(b) for review of unpreserved claims.[9]

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[9] Rule 52(a) was derived from former 28 U.S.C. 391 (1940), entitled "New trials; harmless error," which provided, in language similar to that of the present Rule 52(a): "On the hearing of any appeal * * * the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." See Fed. R. Crim. P. 52(a) advisory committee's note (observing that Rule 52(a) "is a restatement of existing law, 28 U.S.C. former § 391 (second sentence)"). Before adoption of the Federal Rules of Criminal Procedure, there was no similar broad statutory provision directly analogous to the present Rule 52(b) authorizing appellate courts to notice plain errors not brought to the attention of the lower courts. Nonetheless, the courts recognized long before the adoption of the Federal Rules *both* that they had the power to reverse judgments infected by plain error (indeed, some courts had codified that practice in their own procedural rules) *and* that that power should be exercised sparingly and only in compelling cases. Compare, *e.g.*, *Weems* v. *United States*, 217 U.S. 349, 362 (1910) (reversing for plain error), with *Holmgren* v. *United States*, 217 U.S. 509, 521 (1910) (declining to do so). This Court's definitive articulation of the plain-error standard in *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936), also predated the adoption of the Federal Rules. See *Young*, 470 U.S. at 6-7 (noting that *Atkinson* standard was later codified in Rule 52(b)). No court drew from the text of former Section 391, establishing a harmless-error rule that permitted reversal only when errors affected a substantial rights, a negative inference that precluded the higher standard of plain-error review when there was no timely objection below. To the contrary, the plain-error standard (with its more demanding requirements) was developed against the background of a general statutory rule of reversal for error that affected substantial rights.

b. The background of Rule 11(h) confirms that it should not be construed to foreclose the applicability of Rule 52(b) to claims of Rule 11 error that were not preserved in the district court. Rule 11(h) was intended to abrogate prior holdings that a district court's deviation from the procedural requirements of Rule 11 required reversal of the conviction, without a showing of prejudice to the defendant in the particular case. See Fed. R. Crim. P. 11(h) advisory committee's note [hereinafter 1983 Advisory Committee Note]. Rule 11(h) thus made clear that a Rule 11 violation that does not affect substantial rights, *i.e.*, that is not prejudicial, does not require reversal.

Rule 11(h) was enacted in response to three developments. The first was this Court's decision in *McCarthy* v. *United States*, 394 U.S. 459 (1969). In that case, the district court violated the requirement of Rule 11 that it personally inquire of the defendant whether he understood the charges against him before accepting his guilty plea. This Court reversed the conviction and held that Rule 11 mandates that the court inquire into the defendant's understanding of the nature of the

charges and the consequences of his guilty plea. *Id.* at 464-467. The Court then concluded that such a violation of Rule 11 required reversal of the conviction without a specific showing of prejudice. The Court reasoned that failure to comply with Rule 11 was inherently prejudicial, because the defendant was denied the "procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea." *Id.* at 471-472. The Court also explained that automatic reversal for Rule 11 violations would "help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate." *Id.* at 472.[10]

[10] Although *McCarthy* held that a violation of Rule 11 required reversal, it does not stand for the proposition that Rule 11 violations not raised in district court are exempt from the raise-or-forfeit rule. The Court's decision in *McCarthy* did not address that issue, and did not indicate whether defense counsel had objected to the Rule 11 violation in the district court. (In fact, although defense counsel did not object to the violation in the trial court, the government also waived any forfeiture argument on appeal. See U.S. Mem. in Opp. at 1 & n.1, *McCarthy* v. *United States*, *supra* (No. 1209, O.T. 1967).) As this Court has recognized, there is no inconsistency between a rule requiring reversal when a claim of error has been properly preserved in the district court and a rule permitting only plain-error review of the same claim when it has not been properly preserved. Compare *Waller* v. *Georgia*, 467 U.S. 39, 49 (1984) (holding that a denial of the right to a public trial is not subject to harmless-error review), with *Levine* v. *United States*, 362 U.S. 610, 619 (1960) (holding that the failure to object to closure of the proceedings may result in a forfeiture of the right to a public trial); and compare *Vasquez* v. *Hillery*, 474 U.S. 254, 263-264 (1986) (holding that racial discrimination in the selection of the grand jury can never be harmless error), with *Davis* v. *United States*, 411 U.S. 233, 245 (1973) (on collateral challenge under 28 U.S.C. 2255, stating that "[t]he presumption of prejudice which

See also *Halliday* v. *United States*, 394 U.S. 831, 832 (1969) (per curiam).

The second development leading to the adoption of Rule 11(h) was the 1975 amendment to Rule 11, which required a significantly more elaborate colloquy between a district court and the defendant before the court accepts a guilty plea. At the time *McCarthy* was decided, Rule 11 required only that the court "address[] the defendant personally and determin[e] that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea," and that the court satisfy itself "that there is a factual basis for the plea." Fed. R. Crim. P. 11 (1966). As the 1983 Advisory Committee Note accompanying Rule 11(h) observed, under that earlier version of Rule 11, "the chances of a minor, insignificant and inadvertent deviation were relatively slight," and therefore *McCarthy*'s automatic-reversal rule "may have been justified." 1983 Advisory Committee Note, *supra*. But in light of the more elaborate procedures set out in the amended Rule 11, "the chances of a *truly* harmless error" became much greater than had been the case under the version before the Court in *McCarthy*. *Ibid.*

The third development contributing to the adoption of Rule 11(h) was the Court's decision in *United States* v. *Timmreck*, 441 U.S. 780 (1979), holding that collateral relief under 28 U.S.C. 2255 may not be predicated on a violation of the formal requirements of Rule 11. As the 1983 Advisory Committee Note also explains, that holding significantly undercut a major justification for

supports the existence of the right [against racial discrimination in grand jury selection] is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner").

the automatic-reversal rule adopted in *McCarthy*. One purpose of that rule was to alleviate the burden faced by Section 2255 courts in resolving post-conviction challenges to guilty pleas that raised disputes about the understandings held by the defendant at the time of the plea—claims that "are encouraged, and are more difficult to dispose of, when the original record is inadequate." *McCarthy*, 394 U.S. at 469-470, 472. As the Advisory Committee recognized, under *Timmreck*, mere claims of Rule 11 error, at least absent "other aggravating circumstances," 441 U.S. at 785, do not in any event warrant collateral relief. See 1983 Advisory Committee Note, *supra*.

Against that background, the purpose of Rule 11(h) is to "reject[] the extreme sanction of automatic reversal" in light of post-*McCarthy* developments by "mak[ing] clear that the harmless error rule of Rule 52(a) is applicable to Rule 11." 1983 Advisory Committee Note, *supra*. The Advisory Committee focused on the applicability of the harmless-error rule because, following the adoption of the 1975 amendments to Rule 11, "some courts [continued to] read *McCarthy* as meaning that the general harmless error provision in Rule 52(a) cannot be utilized with respect to Rule 11 proceedings." *Ibid.* But although the Advisory Committee made no specific reference to forfeiture or plain error, there was no reason for it to have done so, since the point of the amendment was to eliminate a rule requiring *automatic* reversal because of technical Rule 11 errors. It hardly follows that the Advisory Committee intended to foreclose plain-error review of *unpreserved* claims of Rule 11 error. To the contrary, the abrogation of *McCarthy*'s automatic-reversal rule effected by Rule 11(h) strongly suggests that the Advisory Committee intended that Rule 11 violations should be reviewed on

appeal under the same standards of review routinely applicable to other claims of error. Those standards include, of course, plain-error review for claims not raised in the lower court.[11]

In sum, the text and purpose of Rule 11(h), directing that harmless-error review be applied to claims of Rule 11 error, do not foreclose or supersede the application of standard plain-error analysis to claims that were not presented in the lower court.

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[11] The Federal Rules of Criminal Procedure contain other specific harmless-error provisions, which likewise do not supersede other rules of general applicability governing waiver and forfeiture. For example, Federal Rule of Criminal Procedure 7(c)(3), which concerns indictments and informations, contains a specific harmless-error provision: "[e]rror in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice." By reducing the danger that an erroneous citation will result in dismissal or reversal, the provision is intended to encourage prosecutors to cite the particular statute alleged to have been violated. See Fed. R. Crim. P. 7(c) advisory committee's note. Like Rule 11(h), Rule 7(c)(3) is entitled "Harmless Error," and just as Rule 11(h) makes no reference to forfeiture or plain-error review, Rule 7(c)(3) makes no reference to the rule, set forth in Federal Rule of Criminal Procedure 12(f), that challenges to an indictment are waived unless made before trial. Yet there is no plausible reason why the Advisory Committee would have wanted to eliminate the waiver rule of Rule 12(f) when a defendant complains for the first time on appeal of a miscitation in the indictment. Indeed, treating a failure to timely raise a Rule 7(c)(3) claim as a waiver would advance the goal of encouraging prosecutors to include citations in indictments by minimizing the risk of reversal for citation errors. Rule 7(c)(3) thus demonstrates that the inclusion of a specific harmless-error provision in a rule of criminal procedure does not supersede other rules governing waiver and forfeiture.

3. There is nothing in the nature of a Rule 11(c)(3) violation that should exempt it from the operation of the raise-or-forfeit rule. The purpose of Rule 11 is to protect the defendant from "an unintelligent or involuntary plea." *Mitchell* v. *United States*, 526 U.S. 314, 322 (1999). The advice required by Rule 11(c)(3) also supports the constitutional requirement that the record contain "an affirmative showing that [the guilty plea] was intelligent and voluntary." *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969); see Fed. R. Crim. P. 11(c) advisory committee's note (1974 amend.). But the specific colloquy required by Rule 11(c)(3) is not itself constitutionally mandated (see *McCarthy*, 394 U.S. at 465; *Halliday*, 394 U.S. at 832-833), and the advice required by Rule 11(c)(3) is not a goal in and of itself but rather a means to ensure the voluntariness and intelligence of the defendant's plea.

Contrary to the court of appeals' view (see *United States* v. *Odedo*, 154 F.3d 937, 940 (9th Cir. 1998)), principles of waiver and forfeiture are applicable to Rule 11 errors, notwithstanding the assignment of responsibility to the district court to meet Rule 11's requirements even without a specific request from the defendant. Defense counsel still has the obligation to call to the court's attention that it has committed legal error, as a timely objection would easily permit the error to be avoided or cured. The requirement that a court undertake the procedures mandated by Rule 11(c)(3) before accepting a guilty plea is no more obvious or mandatory than (for example) the prohibition in Rule 24(c) against allowing alternate jurors to be present during jury deliberations, and yet this Court has held that the latter error is forfeited if not brought to the court's attention at trial. See *Olano*, 507 U.S. at 737-741.

The court of appeals therefore erred in applying harmless-error, rather than plain-error, analysis when determining whether the district court's failure to comply with all of Rule 11(c)(3) warranted vacatur of the conviction. As we now explain, the court of appeals also made two other related errors in concluding that respondent's Rule 11 claim warranted vacatur of his guilty plea.

B. A Showing Of Plain Error In A Guilty Plea Colloquy Requires A Finding That The Error Affected The Outcome Of The Proceeding

1. As this Court has explained, plain-error analysis consists of four inquiries:

> [B]efore an appellate court can correct an error not raised [in the trial court], there must be (1) "error," (2) that is "plain," and (3) that "affects substantial rights." If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings."

Johnson, 520 U.S. at 466-467 (further brackets, citations, and internal quotation markets omitted). Thus, before setting aside a conviction based on plain error, the reviewing court must find that the error was prejudicial to the defendant—*i.e.*, that it affected the defendant's "substantial rights." See *ibid.*; *Olano*, 507 U.S. at 734. The harmless-error standard of Rule 52(a) contains a similar requirement that the error must affect substantial rights for a conviction to be reversed. See *ibid.* The principal difference between the prejudice inquiry conducted under Rule 52(a) and that conducted under Rule 52(b) is that plain-error review re-

quires the defendant, rather than the government, to bear the burden of persuasion on prejudice. *Ibid.*

In this case, the court of appeals was mistaken not only in assigning the burden of persuasion to the government, but also in its articulation of the element of prejudice from a Rule 11(c)(3) error. The court stated that, to establish the requisite prejudice under a harmless-error analysis, the government was required to prove that respondent "was aware of his rights despite the district court's failure to apprise him." Pet. App. 6a. The ultimate test of prejudice, however, is whether the error affected the outcome of the proceeding. While a defendant's awareness of his rights is one method to establish the lack of prejudice, it is not the sole inquiry. If the defendant would have pleaded guilty even in the absence of the error, whether because he was actually aware of his rights or for some other reason, then the error had no effect on the defendant's substantial rights, and there is no basis for vacating the guilty plea under either the harmless-error or the plain-error rule.[12]

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[12] In other contexts, the absence of an effect on the outcome may be shown by a comparison between the advice the defendant received in the Rule 11 colloquy and the ultimate sentence imposed. For example, a Rule 11 error does not affect substantial rights when the district court provides the defendant with erroneous information about the maximum possible sentence that the defendant might receive, but then imposes a sentence within the range described. See, *e.g.*, *United States* v. *Raineri*, 42 F.3d 36, 42-43 (1st Cir. 1994) (district court's erroneous information to defendant about the maximum sentence was harmless when the court imposed a sentence within the maximum term it had identified in the Rule 11 colloquy, and there was no reason to conclude that the defendant had any expectation of a lesser penalty), cert. denied, 515 U.S. 1126 (1995); *United States* v. *Chan*, 97 F.3d 1582, 1584 (9th Cir. 1996) (district court's failure to inform the defendant

2. This Court's decisions make clear that the proper test for harmless error under Rule 52(a) is whether the error affected the "outcome" or "result" of the particular proceeding. See, *e.g.*, *Olano*, 507 U.S. at 734; *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 722 (1990); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256 (1988); *Rose* v. *Clark*, 478 U.S. 570, 582 n.11 (1986); *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986); *Berkemer* v. *McCarty*, 468 U.S. 420, 444 (1984); *Chapman* v. *California*, 386 U.S. 18, 22 (1967); *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946). The Court has further explained that this approach to harmless-error analysis requires an evaluation whether the outcome of the proceeding "would have been the same" absent the error, or whether the error "changed the result" of the proceeding. See, *e.g.*, *Jones* v. *United States*, 527 U.S. 373, 402 (1999); *Neder* v. *United States*, 527 U.S. 1, 17 (1999); *Sullivan* v. *Louisiana*, 508 U.S. 275, 280 (1993); *Yates* v. *Evatt*, 500 U.S. 391, 405 (1991); *Chapman*, 386 U.S. at 23. The Court has employed this

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under Rule 11(e)(2) of his right to withdraw his plea was rendered harmless by the court's imposition of the sentence recommended by the government); *United States* v. *McCarty*, 99 F.3d 383 (11th Cir. 1996) (district court's failure to mention possibility of restitution order during Rule 11 colloquy was harmless error, since defendant had notice that he might be required to pay a fine of even greater amount than the restitution that was ordered). The 1983 Advisory Committee specifically acknowledged that form of harmless error. See 1983 Advisory Committee Note, *supra* (Rule 11 error could be found harmless when "the judge's compliance with subdivision (c)(2) was erroneous in part in that the judge understated the maximum penalty somewhat, but the penalty actually imposed did not exceed that indicated in the warnings"). That principle illustrates that the general test for finding a lack of an effect on the outcome requires a context-specific analysis of the particular error and its actual effect.

test not only in determining whether an error at trial might have affected the jury's verdict,[13] but in other types of proceedings as well, including bail hearings (*Montalvo-Murillo*, 495 U.S. at 722), grand jury proceedings (*Bank of Nova Scotia*, 487 U.S. at 263), and sentencing proceedings (*Jones*, 527 U.S. at 394-395; *Williams* v. *United States*, 503 U.S. 193, 203 (1992)).

Plain-error analysis similarly requires the reviewing court to determine whether the error affected the result of the pertinent proceeding. In *Olano*, the Court observed that the requirement of plain-error review under Rule 52(b) that the error must have "affec[ted] substantial rights" means that "in most cases * * * the error must have been prejudicial: It must have *affected the outcome* of the district court proceedings." 507 U.S. at 734 (emphasis added); see also *Jones*, 527 U.S. at 395 (whether any alleged error in the district court's instructions in a capital sentencing proceeding affected the defendant's substantial rights within the meaning of Rule 52(b) turned on "[the error's] effect on the outcome of the proceeding"). Accordingly, to meet his burden of showing that an unpreserved error should be corrected on appeal, a defendant must show that the outcome of the proceeding would have been different but for the error.

In determining whether a Rule 11(c)(3) violation affected the defendant's substantial rights, an appellate court must focus on the impact of the violation on the outcome of the proceeding. And that focus includes an inquiry into whether the defendant would have pleaded

[13] See, *e.g.*, *Neder*, 527 U.S. at 17; *Yates*, 500 U.S. at 405; *Chapman*, 386 U.S. at 25-26; *Kotteakos*, 328 U.S. at 764-765.

guilty even in the absence of the violation.[14] The Court's decision in *Hill* v. *Lockhart*, 474 U.S. 52 (1985), is instructive in this regard. The issue in *Hill* was whether any deficiency in defense counsel's performance in advising the defendant to enter a guilty plea was sufficiently prejudicial to qualify as ineffective assistance of counsel under the test set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984). Under the "prejudice" prong of the *Strickland* test, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, "the result of the proceeding would have been different." *Id.* at 694. Adapting the *Strickland* test for prejudice to the guilty plea context, the Court in *Hill* held that the pertinent inquiry is whether, but for counsel's errors, the defendant "would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59.

The court of appeals in this case did not ask whether respondent would have pleaded guilty, even absent the omission of the Rule 11(c)(3) advice, nor did it ask generally whether the error had an effect on the outcome. Rather, it adopted an unduly narrow view of prejudice flowing from a Rule 11 violation by considering only whether respondent knew from some other source the information that the court erroneously omitted.[15] This Court, however, has clearly indicated

[14] See *United States* v. *Gandia-Maysonet*, 227 F.3d 1, 4 (1st Cir. 2000); *United States* v. *Glinsey*, 209 F.3d 386, 395 (5th Cir.), cert. denied, 121 S. Ct. 282 (2000); *United States* v. *Lyons*, 53 F.3d at 1323; *United States* v. *Wright*, 930 F.2d 808, 810 (10th Cir. 1991).

[15] See Pet. App. 6a ("Under Rule 11(h), we must disregard variances from the colloquy that do not 'affect substantial rights.' Fed. R. Crim. P. 11(h). We have interpreted this to mean that we must inquire whether the defendant was aware of his rights despite the judge's failure to advise him.").

that the proper harmless-error test requires an examination of whether the error affected the outcome of the proceeding. See pp. 31-32, *supra*. That is not to say that the defendant's knowledge of the erroneously omitted information is irrelevant to a proper prejudice analysis. To the contrary, if the defendant was otherwise aware of the omitted advice from another source (because, for example, he received the same information at an earlier court hearing) but nonetheless pleaded guilty, that would ordinarily be sufficient to establish that the district court's failure to provide him with the information at the plea colloquy did not affect his plea. In such a case, the violation clearly did not affect the defendant's substantial rights.[16]

But the inquiry into whether the outcome of the proceeding was affected is broader than the inquiry into whether the defendant was otherwise aware of the omitted information. There are circumstances in which a court could confidently conclude, even without a showing that the defendant knew of the omitted information from another source, that the defendant's determination to plead guilty would not have been affected by the information omitted from the plea colloquy. For

[16] That principle, considered in light of the entire district court record, is sufficient to resolve this case because it is clear that, when respondent pleaded guilty, he was already aware that he had the constitutional right to the assistance of counsel at trial. See pp. 3-5, *supra*. If the court of appeals had reviewed the entire record in the case in making the prejudice determination, as we submit it should have done (see pp. 38-45, *infra*), rather than limiting its scope of review to the transcript of the guilty-plea colloquy, it should have concluded that respondent was already aware of the information that the district court failed to provide him and therefore was not prejudiced by the district court's deviation from Rule 11(c)(3).

example, a defendant might have received a significantly reduced sentence and a nominal fine for pleading guilty. In such a case, a reviewing court could properly find that the district court's failure to inform the defendant of his exposure to a fine, as required by Rule 11(c)(1), did not prejudice him because, in the circumstances, he surely would have pleaded guilty even with advice about the fine. Similarly, in a case where the defendant receives a substantial reduction in sentence pursuant to a negotiated plea agreement but is never informed of a relatively insignificant direct consequence of his plea, a reviewing court could conclude that the outcome would not have been different if the defendant had been aware of the omitted information at the time he entered his plea. See *United States* v. *Littlejohn*, 224 F.3d 960, 969-970 (9th Cir. 2000). See also pp. 30-31, note 12, *supra*.[17]

[17] In *Henderson* v. *Morgan*, 426 U.S. 637 (1976), this Court touched briefly on the question whether an involuntary guilty plea may be found to be harmless error. The Court in *Henderson* concluded that a defendant's guilty plea to intentional murder was involuntary because, in the plea colloquy, neither the trial court nor his lawyer had advised him of the intent-to-kill element of the crime. See *id.* at 645-647. The Court "assume[d]" that the defendant "probably would have pleaded guilty anyway," if he had been advised of the intent element, but found that "assumption" insufficient to prevent a finding that the guilty plea was involuntary at the time it was entered. *Id.* at 644 n.12. And the Court found that the error was not "harmless beyond a reasonable doubt," because the defendant's "unusually low mental capacity" suggested that he might have had a defense to the intent-to-kill element of the crime, thereby reducing the offense to manslaughter. *Id.* at 647. The Court thus implied that if no conceivable defense could have been offered, the error would have been harmless.

Henderson dealt with a constitutionally defective plea entered in the New York state court system, and this Court did not

3. Plain-error review under Rule 52(b) has as its final component an inquiry into whether the court of appeals should exercise its discretion to correct a prejudicial error because the error affected the "fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467; *Olano*, 507 U.S. at 736. Even if the court of appeals were correct in this case in its narrow understanding of when a Rule 11 error is prejudicial—and, as we have discussed above (pp. 31-35, *supra*), the court of appeals' approach is not correct—the fourth component of plain-error review would preclude vacatur of a guilty plea when the violation had no material effect on the proceedings. See *Johnson*, 520 U.S. at 469-470 (assuming that erroneous omission of an element from jury instructions affected substantial rights, but declining to reverse for plain error where the evidence supporting the omitted element was "overwhelming" and "uncontroverted").

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address the implications of plain error review under Federal Rule of Criminal Procedure 52(b). *Henderson* is also different from this case in that the error there was the failure to inform the defendant of the "true nature of the charge against him, the first and most universally recognized requirement of due process," *Henderson*, 426 U.S. at 645 (quoting *Smith* v. *O'Grady*, 312 U.S. 329, 334 (1941)), and that error meant that the defendant never admitted every essential element of the crime. *Id.* at 649 (White, J., concurring); see also *Bousley* v. *United States*, 523 U.S. 614, 618-619 (1998). Nevertheless, the Court in *Henderson* suggested that the error in that case could have been found harmless if there was, in fact, no defense to the intent element. See 426 U.S. at 647. If error of the magnitude involved in *Henderson* can be harmless when it has no effect on the outcome, then a Rule 11 procedural error in the federal system that does not rise to the level of a constitutional violation surely can be harmless when the error has no effect on the outcome.

The stability of convictions based on guilty pleas is particularly important to the criminal justice system. The prosecution focuses considerable energy on preparing to prove its charges in the trial court, and a guilty plea means that those preparations are no longer necessary. Victims and witnesses rely on the finality of the disposition, and the court system moves on to other business. A rule of procedure that freely allowed a defendant to escape his plea, long after its entry, without having raised claim of a Rule 11 defect in the trial court, and without even claiming actual innocence of the offense, would not serve to vindicate the integrity, fairness, or public reputation of judicial proceedings. Rather, such a rule would undermine those values, and potentially force the adjudication of criminal charges after memories have faded and witnesses become unavailable. Accordingly, the discretionary component of plain-error analysis should not permit reversal if a defendant acted knowingly and voluntarily in pleading guilty and the specific advice that the district court failed to provide would have been immaterial to the defendant's plea decision. In those circumstances, there is no basis for a court to conclude that a "miscarriage of justice" would result if he is not allowed to withdraw his plea. Cf. *Olano*, 507 U.S. at 736; *Young*, 470 U.S. at 15.

As the Court stressed in *Johnson*, "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." 520 U.S. at 470 (quoting Roger Traynor, *The Riddle of Harmless Error* 50 (1970)). A rule that would allow a defendant to enter a solemn plea of guilty knowingly and voluntarily and without raising any objections, and then, after sentence and entry of judgment, escape the effect of his guilty plea

because of an error that is of no importance to his decision to plead guilty, would elevate minor flaws over substantial justice. That is not a system of justice that would command public confidence. Cf. *Mechanik*, 475 U.S. at 72 (noting that "[t]he reversal of a conviction entails substantial social costs" and that the "balance of interest" tilts against reversal "when an error has had no effect on the outcome of" the proceeding).

C. A Reviewing Court Should Consider The Entire Record In The Case To Determine Whether A Rule 11(c)(3) Violation Was Prejudicial

In determining whether the district court's Rule 11(c)(3) error affected respondent's "substantial rights," the court of appeals limited its review of the record to the transcripts of the plea colloquy proceedings. See Pet. App. 6a. The court thus declined to consider other relevant evidence in the record bearing on respondent's awareness of his constitutional rights and his decision to plead guilty, including the transcripts of respondent's initial appearance and arraignment, his signed form acknowledging his constitutional rights, and his counsel's signed acknowledgment that respondent had read and understood the rights explained to him in the form.[18] The court of appeals' refusal to consider rele-

[18] As the government noted in its rehearing petition, respondent's initial appearance and arraignment proceedings were not transcribed until after the court of appeals issued its initial opinion in this case. As a result, the government moved to supplement the record in the court of appeals with those materials when it filed its rehearing petition. As respondent acknowledged below, "all these transcripts were in the district court record." See Resp. Opp. to Pet. for Reh'g 3 n.1. The court of appeals did not formally rule on the government's motion to supplement the record. It appears that the court considered that motion to be moot or irrelevant in light of its decision, on rehearing, that it could not consider any information other than the transcript of the guilty plea hearing to determine whether respondent had been prejudiced by the Rule 11 error. Pet. App. 6a-7a ("Thus, we cannot consider the government's claim that [respondent] learned of his right to counsel during earlier court proceedings").

vant record evidence outside the four corners of the plea colloquy transcripts is inconsistent with a proper understanding of both plain-error and harmless-error review.[19]

1. This Court has repeatedly stated that "the harmlessness of an error is to be judged after a review of the entire record." *Yates*, 500 U.S. at 405; see also *Calderon* v. *Coleman*, 525 U.S. 141, 147 (1998) (error to be reviewed "in the whole context of the particular case"); *Williams*, 503 U.S. at 203 ("a remand is appropriate [to correct an error in applying the Sentencing Guidelines] unless the reviewing court concludes, on the record as a whole, that the error was harmless"); *Bank of Nova Scotia*, 487 U.S. at 256 ("a conviction should not be overturned unless, after examining the record as a whole, a court concludes that an error may have had 'substantial influence' on the outcome of the proceeding"); *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986) ("an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt"); *United States* v.

[19] As we explain in the text at pp. 39-45, *infra*, harmless-error review as well as plain-error review requires the court of appeals to consider the entire record to determine whether the defendant was prejudiced by the district court's error. Thus, the court of appeals' incorrect decision to confine its *scope* of review to the plea proceedings in this case requires reversal, even if this Court concludes that harmless error (rather than plain error) is the proper *standard* of review on appeal in this case.

Lane, 474 U.S. 438, 448 n.11 (1986) (harmless error inquiry "requires a review of the entire record"); *United States* v. *Hasting*, 461 U.S. 499, 509 n.7 (1983) ("entire record" must be considered).[20]

The Court has also held that plain-error review likewise requires consideration of the entire record. In *United States* v. *Young*, the prosecutor in his closing argument improperly vouched for the credibility of witnesses and expressed his personal opinion concerning the guilt of the accused. Because the defense did not object to those improper comments, the applicable standard of review on appeal was plain error. In finding that the improper comments constituted plain error, the court of appeals failed to consider that the prosecutor was countering defense counsel's repeated attacks on the prosecution's integrity and claims that the prosecutor did not personally believe in the government's case. This Court held that the court of appeals' limited focus on the prosecutor's comments alone without considering the broader context of the entire trial was flawed, and emphasized that, "[e]specially when addressing plain error, a reviewing court cannot

[20] The Court's numerous statements that harmless-error review requires examination of the record as a whole are consistent with the background of Rule 52(a). Before the adoption of that Rule, the harmless-error statute, 28 U.S.C. 391 (1946), provided that "[o]n the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after *an examination of the entire record before the court*, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties" (emphasis added). Rule 52(a), moreover, was "merely a restatement of existing law and effect[ed] no change in the 'harmless error' rule." *Bihn* v. *United States*, 328 U.S. 633, 638 n.3 (1946); see also Fed. R. Crim. P. 52(a) advisory committee's note (Rule 52(a) was "a restatement of existing law").

properly evaluate a case except by viewing such a claim against the entire record. * * * It is simply not possible for an appellate court to assess the seriousness of the claimed error by any other means." 470 U.S. at 16.

The Court's directives that "the entire record" should be considered on harmless-error and plain-error review indicate that reviewing courts are not limited to examining the specific proceeding in which the error occurred, but rather should evaluate the record of the case as a whole. Indeed, this Court followed that approach in *United States* v. *Mechanik*. In that case, when the Court considered whether an error in the conduct of the grand jury proceedings required reversal of the defendant's conviction, the Court looked beyond the record of the grand jury proceedings to the result of the defendant's subsequent trial. Because "the petit jury's verdict of guilty beyond a reasonable doubt demonstrate[d] *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted" (475 U.S. at 67), the Court concluded that "any conceivable error in the charging decision that might have flowed from the violation" was "rendered harmless" (*id.* at 73).[21]

2. The principle that a court must review the entire record to determine whether an error affected the

[21] When a district court grants a defendant's pretrial motion to dismiss an indictment because of grand jury error, such that there is no trial verdict for the reviewing court to examine on appeal, the appropriate harmless-error inquiry on appeal is whether the error affected the grand jury's decision to indict. See *Bank of Nova Scotia*, 487 U.S. at 263. *Mechanik* demonstrates, however, that in other circumstances, evidence in the record other than the transcript of the grand jury proceeding itself may be relevant to determine whether error in that proceeding requires reversal.

defendant's substantial rights applies with full force to Rule 11(c)(3) violations. Indeed, restricting review of Rule 11(c)(3) errors exclusively to the guilty-plea colloquy is inconsistent with the plain intent of Rule 11(h). The Advisory Committee's Note accompanying the adoption of Rule 11(h) explains that the question of harmless-error should be resolved "solely on the basis of the Rule 11 transcript *and the other portions (e.g., sentencing hearing) of the limited record made in such cases.*" 1983 Advisory Committee Note, *supra* (emphasis added) (internal quotation marks omitted). Thus, the Advisory Committee contemplated the scope and sources of record material that a reviewing court should consider, and rejected the narrow position embraced by the court of appeals in this case, which gave no weight at all to the Advisory Committee's commentary.[22]

As the Advisory Committee's Note recognizes, record evidence outside the transcript of the guilty plea proceeding may be relevant to the determination of whether an omission to comply with Rule 11(c)(3) prejudiced the defendant. Such relevant evidence might include, for example, the court's earlier advice to the defendant of the information later omitted from the Rule 11 colloquy;[23] statements by the defendant or his

[22] Advisory Committee notes accompanying promulgation of a Federal Rule are "of weight" in construing the Rule. *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988); see also *United States* v. *Hyde*, 520 U.S. 670, 676-677 (1997) (relying on advisory committee's note accompanying Fed. R. Crim. P. 32(e) (1983 amend.)); *United States* v. *Sells Eng'g, Inc.*, 463 U.S. 418, 428-429 (1983) (relying on advisory committee's note accompanying Fed. R. Crim. P. 6(e)).

[23] See *Lyons*, 53 F.3d at 1322; *United States* v. *Gray*, 611 F.2d 194, 202 (7th Cir. 1979), cert. denied, 446 U.S. 911 (1980)).

attorney at earlier proceedings reflecting the defendant's knowledge of the omitted information;[24] a signed plea agreement or other filing in which the defendant acknowledged his awareness of the omitted information;[25] the defendant's acknowledgment at a post-guilty plea proceeding that he knew of the omitted information at the time of his guilty plea or that the omitted information had no effect on his plea;[26] or the defendant's failure to object, seek to withdraw his plea, or show surprise on being provided with the omitted information at a post-guilty plea proceeding, suggesting either that he was otherwise aware of the omitted information or that it would have had no effect on his decision to plead guilty.[27] All those kinds of evidence could have a significant bearing on whether the defendant was in fact prejudiced by the district court's failure to inform him of one of the aspects of the advice required by Rule 11(c)(3), and there is no reason why a reviewing court should blind itself to that information.

Moreover, a rule limiting the prejudice inquiry to the guilty-plea colloquy would lead to absurd results in some situations. Assume, for example, that a defendant initially elected to plead not guilty and decided to proceed to trial, but during the trial, after his attorney

[24] See *United States* v. *Peden*, 872 F.2d 1303, 1309 (7th Cir. 1989); *Gray*, 611 F.2d at 202.

[25] See *Driver*, 242 F.3d at 771; *United States* v. *Jones*, 143 F.3d 1417, 1420 (11th Cir. 1998); *United States* v. *Maher*, 108 F.3d 1513, 1521 (2d Cir. 1997); *Lopez-Pineda*, 55 F.3d at 697; *United States* v. *Vance*, 868 F.2d 1167, 1172 (10th Cir. 1989); *United States* v. *Lovett*, 844 F.2d 487, 491 (7th Cir. 1988).

[26] See *United States* v. *Saft*, 558 F.2d 1073, 1080 (2d Cir. 1977).

[27] See *Lopez-Pineda*, 55 F.3d at 697; *Lyons*, 53 F.3d at 1323; *Lucas* v. *United States*, 963 F.2d 8, 14-15 (2d Cir.), cert. denied, 506 U.S. 895 (1992).

had delivered an opening statement and had cross-examined government witnesses, the defendant changed his mind and decided to enter a guilty plea. In those circumstances, the court's failure to advise the defendant during the Rule 11 colloquy that he had the right to the assistance of counsel at trial, as required by Rule 11(c)(3), plainly should not require vacatur of the plea. In such circumstances, there could be no doubt that the defendant already knew about that right, even though his knowledge might not be reflected in the transcript of the colloquy. See *United States* v. *Dayton*, 604 F.2d 931, 946 (5th Cir. 1979) (Brown, C.J., concurring), cert. denied, 445 U.S. 904 (1980).

3. The only explanation given by the court of appeals for confining its review to the record of the plea colloquy is that the limitation "ensures that a defendant is fully aware of his rights *when his plea is entered*--that he is aware of them *at the time they are being waived.*" Pet. App. 6a (internal quotation marks omitted). That explanation, however, ignores the substantial possibility that record evidence outside the four corners of the Rule 11 proceeding, such as the factors enumerated above, might establish that the defendant knew the omitted information at the time he pleaded guilty. Even if the defendant did not state on the record at the exact moment that he entered his guilty plea that he was aware that he would have the right to counsel if he elected to proceed to trial, the record in the case might demonstrate persuasively that the defendant was aware of that right throughout the case.

More generally, the court of appeals' rationale for its limited review is predicated on the erroneous assumption that the proper test for determining whether a Rule 11(c)(3) violation prejudiced a defendant turns on whether the defendant otherwise knew about the

omitted information, rather than whether the error affected the outcome of the proceedings, including the defendant's decision to enter a guilty plea. See pp. 33-35, *supra*. The record of other proceedings in a case may establish persuasively that the defendant would have pleaded guilty even if he had been provided with the information that the court erroneously neglected to provide at the guilty plea proceeding. A reviewing court should not refuse to consider such relevant evidence.

D. The District Court's Rule 11(c)(3) Violation In This Case Was Not Plain Error

Taking into account the record of the case as a whole instead of just the guilty plea colloquies, it is clear that the district court's Rule 11(c)(3) violation did not amount to plain error. The evidence as a whole establishes that respondent was informed of the exact right at issue in earlier proceedings, and therefore the violation did not affect respondent's substantial rights or warrant vacatur of his plea.

The record as a whole shows the following:

- On February 28, 1997, at respondent's initial appearance, the district court expressly advised him of his "right to retain and to be represented by an attorney of your own choosing at each and every sta[g]e of the proceedings against [him]" and of his right to appointed counsel if he could not afford an attorney. J.A. 15.
- Later during the same proceeding, the court, addressing respondent personally, asked him if he had heard and understood his rights and

that respondent answered in the affirmative. J.A. 18.

- On March 17, 1997, at respondent's arraignment on the initial indictment, the court advised respondent once again that he had the right "to be represented by counsel at all stages of the proceedings," and that, if he could not afford an attorney, one would be appointed without cost to him. J.A. 22.
- Respondent's counsel then provided the court with respondent's signed "Statement of Defendant's Constitutional Rights," in which respondent acknowledged his constitutional right "to be represented by counsel at all stages of the proceedings against [him]." J.A. 25, 26, 28.
- Respondent's counsel also signed a statement at the end of that form indicating that counsel was "satisfied that [respondent] has read this Statement of Rights * * * and that [he] understands them." J.A. 29.
- At the conclusion of the arraignment, the court, through the clerk, asked respondent personally whether he had heard and understood the statements of the court "[p]ertaining to your rights and the appointment of counsel," and whether he had seen and signed the statement of rights that had been submitted to the court by his attorney, to both of which questions respondent answered, "Yes." J.A. 25.

In short, before he pleaded guilty on May 12, 1997, and September 3, 1997, respondent had been advised on

three separate occasions in the course of the case of his right to counsel at trial, and on four separate occasions he or his counsel affirmed that he understood that right. Two of those advisements and two of respondent's affirmations that he understood his rights took place in open court. Accordingly, the record as a whole shows that respondent knew of his right to counsel at trial when he pleaded guilty, and that the district court's error in omitting to advise him of that right at the guilty plea hearing therefore did not affect respondent's decision to enter guilty pleas.

With respect to respondent's second guilty plea, that conclusion is strongly bolstered by additional evidence. First, at the June 9, 1997, status conference, defense counsel sought and obtained in respondent's presence a continuance of the trial date because of a scheduling conflict that would have prevented the attorney from attending on the scheduled date, and the court addressed respondent personally to explain to him the need for the continuance. J.A. 47. Second, in its excludable-time order relating to the continuance of the trial date, the court stated that respondent and his attorney were "initially prepared to go forward with this case" on June 10, 1997, indicating that at some point before June 10 respondent must have become aware that his attorney would represent him at trial. Gov't C.A. Ex. Rec. 43. Finally, on August 4, 1997, at respondent's arraignment on the superseding indictment, defense counsel requested and was granted in respondent's presence additional time to prepare for trial. *Id.* at 51-52.

In light of that evidence, it is clear that respondent knew, when he pleaded guilty to the conspiracy and firearms counts on September 3, 1997 (just six days before the scheduled trial date), that his appointed

counsel would have represented him if he had chosen to proceed to trial. And at no time did respondent move to withdraw his initial guilty plea resolving the bank robbery charge. Taken together with the earlier evidence in the record showing that respondent was advised of his right to counsel at all stages of the proceeding and his acknowledgment that he understood that right, there is no basis for vacating his plea because of the district court's departure from Rule 11(c)(3). The colloquy under Rule 11 is ultimately designed to ensure the entry of knowing, voluntary, and intelligent guilty pleas; it is not designed to create a means for a defendant who knowingly, voluntarily, and intelligently entered such a plea to overturn his conviction because the trial court omitted to advise the defendant of information that he already knew.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 2001

Supreme Court, U.S.
FILED
APR 30 2001

No. 00-973

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ALPHONSO VONN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: DEC. 13, 2000
CERTIORARI GRANTED: FEB. 26, 2001

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NOTICE

The following items have been omitted in printing this appendix because they appear on the following pages in the printed appendix to the petition for a writ of certiorari:

Judgment of conviction (June 29, 1998)	23a
Initial decision of court of appeals (Apr. 20, 2000)	11a
Decision of court of appeals on rehearing (Sept. 14, 2000)	1a

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 97-CR-233-ALL

UNITED STATES OF AMERICA, PETITIONER

v.

ALPHONSO VONN

[Filed: March 14, 1997]

DOCKET ENTRIES

DATE	DOCKET NUMBER	DOCKET ENTRIES
2/28/97	1	COMPLAINT filed against Alphonso Vonn in violation of 18:2113(a)(d) & 924(c). Approved by Magistrate Judge Andrew J. Wistrich. [2:97-m-434] (ca) [Entry date 03/13/97]
		* * * * *
2/28/97	14	REPORT COMMENCING CRIMINAL ACTION as to Alphonso Vonn arrested on 2/28/97 Defendant's date of birth: 9/27/75. [2:97-m -434] (ca) [Entry date 03/13/97]

DATE	DOCKET NUMBER	DOCKET ENTRIES
		* * * * *
2/28/97	16	FINANCIAL AFFIDAVIT filed as to Alphonso Vonn. [2:97-m -434] (ca) [Entry date 03/13/97]
		* * * * *
2/28/97	18	MINUTES OF ARRAIGNMENT ON MAGISTRATE COMPLAINT held before Magistrate Judge Andrew J. Wistrich as to Alphonso Vonn: Defendant arraigned and states true name as charged. First appearance of Alphonso Vonn entered. DFPD Attorney Humberto Diaz present as to Alphonso Vonn. Bail set at detention. Defendant committed to the custody of the U.S. Marshal. Crt ords preliminary hearing set for 4:30pm, 3/14/97; post indictment arraignment set for 8:30am, 3/17/97 for Alphonso Vonn; detention hearing set for 11:30am, 3/4/97 for Alphonso Vonn Tape No.: 97-22 [2:97-m -434] (ca) [Entry date 03/13/97]
		* * * * *

DATE	DOCKET NUMBER	DOCKET ENTRIES
3/14/97	21	INDICTMENT filed against Alphonso Vonn (1) count(s) 1, 2, James Andre Cox (2) count(s) 1, 2, Gregory Lee Turner (3) count(s) 1, 2 filed by AUSA Terri Law. Offense occurred in LA. (dm) [Entry date 03/14/97]
		* * * * *
3/17/97	26	MINUTES OF POST-INDICTMENT ARRAIGNMENT HEARING held before Magistrate Judge Virginia A. Phillips as to Alphonso Vonn (1) count(s) 1, 2, James Andre Cox (2) count(s) 1, 2, Gregory Lee Turner (3) count(s) 1, 2. Case reassigned to Judge James M. Ideman. Alphonso Vonn (1) count(s) 1, 2, James Andre Cox (2) count(s) 1, 2, Gregory Lee Turner (3) 1, 2 arrn and states true name as charged. DFPD Atty Derek Li, CJA Richard P. Lasting, CJA Phillip Deitch pres. *Terminating atty Humberto Diaz for Alphonso Vonn; atty William L.

DATE	DOCKET NUMBER	DOCKET ENTRIES
		0'Bryan for Gregory Lee Turner, atty Christopher Stephen Dombrowski for James Andre. Plea and trial setting set for 1:30 pm on 3/17/97. Tape No.: 1024/1025 (mc) [Entry date 04/04/97]
3/17/97	27	STATEMENT OF DEFENDANT'S CONSTITUTIONAL RIGHTS filed as to Alphonso Vonn. (mc) [Entry date 04/04/97]
		* * * * *
5/5/97	47	MINUTES OF STATUS CONFERENCE held before Judge James M. Ideman as to Alphonso Vonn: Dft wants to go forward w/change of plea. Cnsl is not prepared to go forward today. Matter cont to 5/12/97 at 1:30pm for fur S/C for Alphonso Vonn. C/R: Deborah Gackle (mc) [Entry date 05/12/97]

DATE	DOCKET NUMBER	DOCKET ENTRIES
5/12/97	48	MINUTES OF CHANGE OF PLEA HEARING held before Judge James M. Ideman as to Alphonso Vonn: Defendant moves to change plea to the Indict. Plea of guilty entered by Alphonso Vonn (1) count(s) 1. The Court questions the defendant regarding plea of guilty and finds it knowledgeable and voluntary and orders the plea accepted and entered. The Court refers Alphonso Vonn to the Probation Office for investigation and report. Sent set for 1:30pm on 9/15/97 for Alphonso Vonn. C/R: Deborah Gackle (mc) [Entry date 05/14/97]
		* * * * *
6/9/97	51	STIPULATION Re cont of trial date AND ORDER filed by Judge James M. Ideman as to Alphonso Vonn, James Andre Cox, Gregory Lee Turner: It is so ord that trial be cont to 8/12/97. (mc) [Entry date 06/11/97]
		* * * * *

DATE	DOCKET NUMBER	DOCKET ENTRIES
7/29/97	57	FIRST SUPERSEDING INDICTMENT filed against Alphonso Vonn (1). count(s) 1s, 3s, Gregory Lee Turner (3) count(s) 1s, 2s, 3s. AUSA Elaine Lu (ca) [Entry date 07/31/97]
		* * * * *
9/3/97	70	MINUTES OF CHANGE OF PLEA HEARING held before Judge James M. Ideman as to Alphonso Vonn: Defendant moves to change plea to the plea of guilty entered by Alphonso Vonn (1) count(s) 1s, 3s. The Court refers Alphonso Vonn to the Probation Office for investigation and report.,; sentence hearing set for 1:30 12/15/97 for Alphonso Vonn, C/R: Deborah Gackle (rm) [Entry date 09/08/97]
9/9/97	71	AMENDED MINUTES OF CHANGE OF PLEA HEARING held before Judge James M. Ideman as to Alphonso Vonn: Defendant moves to change plea to the plea of guilty

DATE	DOCKET NUMBER	DOCKET ENTRIES
		entered by Alphonso Vonn (1) count(s) 1s, 3s,; sentence hearing set for 1:30 1/12/98 for Alphonso Vonn, Tape No.: C/R: Deborah Gackle (rm) [Entry date 09/12/97]
		* * * * *
5/14/98	84	NOTICE OF MOTION; MOTION filed by Alphonso Vonn for withdrawal of guilty plea Declar of cnsl; exhibits Returnable on: 6/8/98, 1:30 p.m.. (ca) [Entry date 05/15/98]
		* * * * *
6/8/98	87	MINUTES OF MOTION FOR WITHDRAWAL OF GUILTY PLEA AS TO COUNT 3 (SENTENCING 6/22/98) HEARING held before Judge James M. Ideman as to Alphonso Vonn: crt hears frm dft cnsl re opposition of AUSA. Crt finds dft under oath, clearly indicated his guilt; denying motion for withdrawal of guilty plea [84-1] C/R: Irene Nakamura (ca) [Entry date 06/11/98]
		* * * * *

DATE	DOCKET NUMBER	DOCKET ENTRIES
6/22/98	98	MINUTES OF SENTENCING held before Judge James M. Ideman as to Alphonso Vonn (1) count(s) 1, 1s, 3s. CTS 1, 1s & 3s: Dft hereby comm to BOP for a term of 37 mos as to ct 1 of CR 97-233 & ct 1 of CR 97-233(a), said terms to be svd conc w/each othr & 60 mos as to ct 3 of CR 97-233(a), to be svd cons to the other term imposed for a total of 97 mos. Upon release frm imprisonment dft shall be placed on supv rel for a trm of 3 yrs, as to ct 1 of CR 97-233 & cts 1 & 3 CR 97-233(a), said terms to be svd conc w/each other under the following terms & cond's: comply w/rules & reg of the PO & GO 318: all fines are waived, including the costs of imprisonment & supv, as it is found tht dft does not hv the ability to pay. Dft is ord to pay a s/a of $300.00; dft is given his rights on appeal; crt recommends designation to a S/C facility to facilitate visitation by relatives. dismissing count(s) as to AlphonsoVonn (1) count(s) 2.

DATE	DOCKET NUMBER	DOCKET ENTRIES
		Ct 2 is dismissed in the interest of justice, C/R: Buford James (ca) [Entry date 07/02/98]
6/23/98	95	ORDER filed by Judge James M. Ideman as to Alphonso Vonn: denying motion for withdrawal of guilty plea [84-1] (cc: all counsel) (ca) [Entry date 06/24/98]
		* * * * *
6/29/98	99	JUDGMENT AND COMMITMENT issued to U.S. Marshal for Alphonso Vonn Approved by Judge James M. Ideman. Entered on: 7/2/98. (ca) [Entry date 07/02/98]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Court of Appeals Docket #: 98-50385

UNITED STATES OF AMERICA, PETITIONER

v.

ALPHONSO VONN

Appeal from: Central District of California,
Los Angeles

[Filed: July 10, 1998]

DOCKET ENTRIES

DATE	PROCEEDINGS
9/16/99	ARGUED AND SUBMITTED TO James R. BROWNING, Alex KOZINSKI, Kim M. WARDLAW [98-50384, 98-50385] (rmw) [98-50384 98-50385]

* * * * *

DATE	PROCEEDINGS
4/20/00	FILED OPINION: VACATED and REMANDED. (Terminated on the Merits after Oral Hearing; Remanded; Written, Signed, Published. James R. BROWNING; Alex KOZINSKI, author; Kim M. WARDLAW.) FILED AND ENTERED JUDGMENT. [98-50385] (ca) [98-50385]
6/5/00	[3923333] Filed original and 3 copies of Appellee USA's petition for rehearing of 11 pages and 1 supplemental excerpt of record in 1 volume; served on 6/2/00. (PANEL) (ca)
6/5/00	Filed USA's motion to expand the record; served o 0/02/00. (Faxed to PANEL) [98-50385] (ca) [98-50385]
6/8/00	Received Appellant Alphonso Vonn's opposition to government's petition for rehearing; served on 6/7/00. (PANEL) [98-50385] (ca) [98-50385]
9/14/00	Filed order and amended opinion (Judges James R. BROWNING, Alex KOZINSKI, Kim Mclane WARDLAW) (Orig. opinion id:) The opinion filed 4/20/00, and reported at 211 F.3d 1109, is withdrawn and superseded by the attached opinion. The petition for rehearing is otherwise DENIED. [98-50385] (ca) [98-50385]

* * * * *

CRIMINAL COMPLAINT

Rev. 11/82

UNITED STATES DISTRICT COURT	CENTRAL DISTRICT OF CALIFORNIA
UNITED STATES OF AMERICA v. ALPHONSO VONN, JAMES ANDRE COX, and GREGORY LEE TURNER	Docket No.
	Magistrate's Case No. 97-
Complaint for violation of Title 18, United States Code § 2113(a)(d) & 924(c)	

Name of Magistrate Judge ANDREW J. WISTRICH	UNITED STATES MAGISTRATE JUDGE	Location Los Angeles, CA

Date of Offense 2/24/97	Place of Offense Los Angeles County	Address of Accused (If known)

Complainant's Statement of Facts Constituting the Offense or Violation:

COUNT ONE - 18 U.S.C. § 2113(a)(d)

On or about Febraury 27, 1997, in Los Angeles County, within the Central District of California, defendants ALPHONSO VONN, JAMES ANDRE COX, and GREGORY LEE TURNER, by force, violence and intimidation, took from the person or presence of another approximately $209.00, belonging to and in the care, custody, control, management and possession of Farmers and Merchants Bank, 1401 Long Beach Blvd., Long Beach, California, a bank whose deposits were then insured by the Federal Deposit Insurance Corportation.

In committing the offense, defendants ALPHONSO VONN, JAMES ANDRE COX, and GREGORY LEE TURNER assaulted persons inside the bank by use of a gun, a dangerous weapon and device.

COUNT TWO - 18 U.S.C. § 924(c)

On or about February 27, 1997, in Los Angeles County, within the Central District of California, defendants ALPHONSO VONN, JAMES ANDRE COX, and GREGORY LEE TURNER used and carried a firearm in connection with the commission of a crime of violence, in violation of Title 18, United States Code, Section 924(c).

BASIS OF COMPLAINANT'S CHARGE AGAINST THE ACCUSED:
(See attached affidavit which is incorporated as part of this Complaint)

Material witnesses in relation to this charge:

Being duly sworn, I declare that the foregoing is true and correct to the best of my knowlege	Signature of Complainant SALLY A. BROWN
	Official Title Special Agent - FBI

Sworn to before me and subscribed in my presence,

Signature of Magistrate Judge (1)	**DATE** February 28, 1997

1) See Federal Rules of Criminal Procedure rules 3 and 54.
TL: deny REC: DETENTION (for all defendants)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos. 97-434M(3) and 97-434M(1)

UNITED STATES OF AMERICA, PLAINTIFF

v.

GREGORY LEE TURNER,
ALPHONSO VONN, DEFENDANTS

ARRAIGNMENT

[Feb. 28, 1997]

BEFORE: HONORABLE ANDREW J. WISTRICH
UNITED STATES DISTRICT MAGISTRATE JUDGE.

[4] Los Angles, California; February 28, 1997

THE CLERK: Criminal Calendar, Judge Wistrich, February 28, 1997.

The HONORABLE ANDREW J. WISTRICH, United States Magistrate Judge Presiding.

THE COURT: Before the afternoon calendar is called, I will advise all defendants present of their constitutional and statutory rights in connection with these proceedings.

You are here because you've been charged with a criminal offense against the United States. You have received, or soon will receive a copy of the formal papers summarizing the charges against you.

You have the following constitutional and statutory rights. Please listen carefully.

You have the right to retain and to be represented by an attorney of your own choosing at each and every state of the proceedings against you.

If you cannot afford an attorney, you have the right to request that the Court appoint an attorney to represent you.

The appointed attorney will be paid by the Government at no cost to you. You must, however, submit a financial affidavit to the Court before Counsel may be appointed.

[5] If you make any false, misleading or incomplete statements in your financial affidavit, you may be subject to further prosecution for a separate violation of federal law.

You have the right to remain silent. If you start to make a statement, you may stop at any time.

Anything that you do say, sign or write which tends to incriminate you may be introduced against you in this or in any other court proceeding.

You have the right to have the issue of your release on bail or detention in custody prior to trial determined in accordance with the provisions of the Bail Reform Act.

If the Government seeks detention, you have the right to a hearing on the issue on the day of your first appearance in Court or within three to five court days thereafter.

If you [are] ordered detained in custody prior to trial, you have the right upon application to have the decision reviewed by a District Judge of this Court.

You are entitled to be present at any future hearing where further evidence or argument will be heard regarding the issue of detention in custody or release on bail.

You also have the right to a preliminary hearing or to have the case presented to the grand jury within 10 days [6] of this date if you're in custody and within 20 days of this date if you are released on bond.

A preliminary hearing is a proceeding in which the Government presents its evidence and a decision is reached as to whether there is probable cause to believe that the offense charged was committed, and that you are the person who committed it.

If probable cause is not found, the matter will be dismissed. If probable cause is found, you will then be required to enter a plea to the charges against you.

Some of you may be here because you've been charged in an out-of-district complaint or indictment. If so, you will be informed of the charges against you.

If the formal papers have not yet been filed in this Court, you may request a continuance for arrival of process.

If you wish, you may waive all further proceedings in this Court, and request that you either be transported or permitted to appear in the district where the charges against you originated.

If you do not wish to waive process and return to the other district, you have the right to a removal hearing. Such a hearing includes a determination of probable cause, if one has not already been made in your case, and of your identity.

[7] Unless waived, a removal hearing must be held before you can be required to answer charges against you in another district.

If you wish to plead guilty to the charges against you, and to do so in this district, your attorney may request a continuance so that the consent of the United States Attorney in this district and the charging district may be obtained.

* * * * *

[9] THE CLERK: 97-434M(1), United States of America versus Alphonso Vonn.

MR. DIAZ: Good afternoon, Your Honor. Humberto Diaz seeking appointment of counsel on behalf of Mr. Vonn who is present.

[10] MR. ARIAN: Good afternoon, Your Honor. Lee Arian again for the Unitd States.

THE COURT: Good afternoon, Counsel.

Mr. Vonn, please state your true and complete name.

DEFENDANT VONN: Alphonso Vonn.

THE COURT: Were you present in Court earlier while I explained your rights?

DEFENDANT VONN: Yes, sir.

THE COURT: Were you able to hear and understand that explanation?

DEFENDANT VONN: Yes, sir.

THE COURT: Did you sign this financial affidavit seeking appointment of counsel?

DEFENDANT VONN: Yes, sir.

THE COURT: Are the statements contained in it true and complete?

DEFENDANT VONN: Yes, sir.

THE COURT: Based on the information contained in your affidavit, I find that you are eligible for appointment of counsel. Mr. Diaz is appointed to represent you.

Have you received a copy of the charges against you, Sir?

DEFENDANT VONN: Yes, sir.

THE COURT: You're satisfied that you understand what it is that you're being accused of?

[11] DEFENDANT VONN: I understand, sir.

* * * * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CR 97-233

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALPHONSO VONN, JAMES ANDRE COX,
AND GREGORY LEE TURNER, DEFENDANTS

INDICTMENT

[18 U.S.C. § 2113(a)(d): Armed
Bank Robbery; 18 U.S.C. § 924(c):
Using and Carrying a Firearm
During a Crime of Violence]

[February 1997
Grand Jury]

The Grand Jury charges:

COUNT ONE

[18 U.S.C. § 2113(a)(d)]

On or about February 27, 1997, in Los Angeles County, within the Central District of California, defendants ALPHONSO VONN, JAMES ANDRE COX, and GREGORY LEE TURNER, by force, violence and intimidation, knowingly took from the person or pre-

sence of another approximately $209.00 belonging to and in the care, custody, control, management, and possession of Farmers and Merchants Bank, 1401 Long Beach Blvd., Long Beach, California, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

In committing said offense, defendants assaulted and put in jeopardy the life of victim teller Lorida Lee Parker and others by using a gun, a dangerous weapon and device.

COUNT TWO

[18 U.S.C. § 924(c)]

On or about February 27, 1997, in Los Angeles County, within the Central District of California, defendants ALPHONSO VONN, JAMES ANDRE COX, and GREGORY LEE TURNER knowingly used and carried a firearm, namely, a semi-automatic handgun during and in relation to a crime of violence, namely, bank robbery of Farmers & Merchants Bank, 1401 Long Beach Blvd., California, in violation of Title 18, United States Code, Section 2113(a)(d).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 97-233-JMI

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALPHONSO VONN, JAMES ANDRE COX,
AND GREGORY LEE TURNER, DEFENDANTS

POST-INDICTMENT ARRAIGNMENT

[March 17, 1997]

BEFORE: HONORABLE VIRGINIA A. PHILLIPS
UNITED SATES MAGISTRATE JUDGE.

[4] Los Angeles, California; Monday, March 17, 1997

THE CLERK: Post-indictment araignment on Monday, March 17th, 1997 before MAGISTRATE JUDGE VIRGINIA A. PHILLIPS. This is Tape Number 1024.

You may be seated.

THE COURT: Good morning.

Before the arraignment calendar is called this morning, I want to advise the Defendants of their constitutional rights and explain the procedures followed in this Court.

Each Defendant is here this morning because—

(PAUSE IN PROCEEDINGS.)

THE COURT: All right. Each Defendant is here this morning because he or she has been charged with a violation of federal law.

The charge against you is contained in an indictment or information, and a copy of the charge has been given to you or will be given to you this morning. And later today you'll be called on to plead either guilty or not guilty to each charge.

You have the following constitutional rights.

First, you're entitled to a speedy and public trial by a jury or by a judge alone if jury is waived.

You're entitled to be represented by counsel at all stages of the proceedings. If you don't have the money or [5] means to hire an attorney, I will appoint an attorney to represent you without cost or expense to you.

However, you're advised that you must complete a financial statement before counsel will be assigned. And if you give a false or dishonest answer to any question contained in a financial statement, or if you willfully fail to respond to the questions accurately, you may be prosecuted for a violation of federal law.

You are entitled to see and hear the evidence and the witnesses against you and to cross-examine the witnesses.

You're entitled to subpoena witnesses and to compel the production of other evidence on your own behalf.

You have the right to have the Court consider the conditions of your release in accordance with the Bail Reform Act of 1984.

If the Government seeks to have you detained while you wait for trial, you have the right to a hearing on the first day of your appearance in Court or within three to five days of your first Court appearance if a continuance is requested by either the defense or the prosecution and the request is granted.

It is not necessary for you to prove your innocence. It is the burden of the Government to prove your guilt beyond a reasonable doubt.

For your plea and for all further proceedings, your [6] case will be transferred to a District Judge of this Court. The particular Judge for your case will be selected by lot after you've been arraigned.

All motions are reserved and must be made before the Judge to whom the case is transferred.

Where a particular case involves more than one Defendant, all Defendants are required to appear before the Judge to whom that case is transferred.

If the District Judge has requested that the Magistrate Judge receive a not guilty plea, he'll be asked to plead and a trial date will be set.

The Clerk has designated the Federal Public Defender and members of the Indigent Panel to represent certain defendants this morning. The attorneys so

designated are hereby appointed in the respective cases to which they have been assigned.

If private counsel is appearing for any defendant for whom a court-appointed attorney was previously designated, private counsel should make his or her presence known and file his or her praecipe. And the court-appointed attorney will then be relieved.

When I transfer a case to a Judge of this Court and announce the time for appearance, Defendant and Counsel of Record are ordered to appear before that Judge at the time that I specify.

[7] If counsel have appearances this morning or afternoon at the same time in more than one court, counsel are directed to appear first in the court of the judge who has senior status on the court.

However, if counsel is direct to appear in two or more courts at different times, counsel shall first attend the court which has fixed the earlier hours of convening.

All right. The Clerk may call the calendar.

(Subseqent proceedings recorded, but not transcribed.)

THE CLERK: Calling Item 8, CR 97-233, U.S.A. versus Alphonso Vonn, James Andre Cox and Gregory Lee Turner.

MR. LI: Good morning, Your Honor. Derek Li appearing with Alphonso Vonn, who is present. My office has been previously appointed.

His thing on the constitutional rights has been filed. Because Mr. Vonn has a broken arm, he was not able to sign it. But the mark on the signature line was his.

THE COURT: Thank you.

[8] THE CLERK: Is Alphonso Vonn you true name?

DEFENDANT VONN: Yes, Ma'am.

THE CLERK: Did you hear and understand the statements of this Court—

DEFENDANT VONN: Yes.

THE CLERK: —Pertaining to your rights and the appointment of counsel?

DEFENDANT VONN: Yes.

THE CLERK: Did you see and sign a statement of your rights?

DEFENDANT VONN: Yes.

THE CLERK: Did you receive a copy of the indictment?

DEFENDANT VONN: Yes.

THE CLERK: Would you like the indictment read to you?

DEFENDANT VONN: No.

THE CLERK: No. Thank you.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA PLAINTIFF(S), -vs- ALPHONSO VONN DEFENDANT(S).	CASE NUMBER CR 97-233 STATEMENT OF DEFENDANT'S CONSTITUTIONAL RIGHTS

You are here for arraignment and plea upon an indictment or information filed against you, a copy of which will be given to you.

You are entitled to a speedy and public trial by jury. If you wish to waive a jury trial, you may be tried by the Court sitting without a jury.

You are entitled to be represented by counsel at all stages of the proceedings against you. If you do not have the funds or the means to hire a lawyer, tell the Magistrate Judge and he will appoint a member of the Indigent Defense Panel or a Deputy Federal Public Defender to represent you without cost to you.

You are entitled to see and hear the evidence and cross-examine witnesses against you. You are entitled to the processes of the Court to subpoena witnesses on your behalf without cost to you if you are indigent. It is not necessary to prove your innocence. It is the burden of the government to prove, by competent evidence, your guilt beyond a reasonable doubt.

If you desire to plead guilty, you will be further questioned by a Court to ascertain whether or not your plea is voluntary. In the event your plea is accepted, the Court will sentence you after referral to the Probation Officer for presentence report. This procedure usually takes about ten (10) weeks. Before accepting a plea of guilty, the Judge expects that you have discussed your case fully with your lawyer and have been fully advised of all the defenses you may have. You will be expected to know the maximum and minimum sentence you can receive on your plea of guilty.

No one should plead guilty unless he is in fact guilty of the charges made against him/her in the indictment or information. Do not plead guilty if there have been any threats made against your or any member of your family by anyone. Do not plead guilty if there have been any promises of leniency or a particular sentence made to you by anyone including your own lawyer. No one has the authority to make any promises to you concerning sentence.

Your case will be referred to one of the Judges of this Court for all other proceedings. The name of the Judge will be drawn after your arraignment and all further proceedings will be before that Judge.

(OVER)

ACKNOWLEDGMENT OF DEFENDANT:

I have read the above Statement of Rights and understand them. I do not require a translation of this statement nor do I require an interpreter for court proceedings.

Dated: March 17, 1997 X
Signature of Defendant

[(Mark made by Mr. Vonn, who could not sign because of a broken arm)]

[OR]

I have personally heard a translation in_____language read to me and understand the above Statement of Rights.

Dated: _____ _____
Signature of Defendant

Have you received a copy of the Indictment/ Information? ☒ Yes ☐ No

Do you have an attorney? ☒ Yes ☐ No

If yes, Attorney's name: Derek W. Li (Please Print)
☐ Retained
☐ Appointed
☒ DFPD

STATEMENT OF INTERPRETER:

I have translated the Statement of Rights to the defendant in the _____ language.

Dated: _____ _____
Signature of Interpreter

_____
(PLEASE PRINT NAME)

STATEMENT OF COUNSEL:

I am satisfied that the defendant has read this Statement of Rights (and the translation thereof, if necessary) and that he/she understands them.

Dated: March 17, 1997 /s/ Derek Li
Signature of Attorney

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 96-233-JMI

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALPHONSO VONN, JAMES ANDRE COX,
AND GREGORY LEE TURNER, DEFENDANTS

STATUS CONFERENCE

[May 5, 1997]

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[3] THE CLERK: Item No. 4, CR 97-233-JMI, United States of America versus Alphonso Vonn and James Andre Cox.

Counsel.

MS. LU: Good afternoon, Your Honor. Elaine Lu appearing on behalf of the United States.

MR. LASTING: Good afternoon, again, Richard Lasting with Mr. Cox.

MR. LI: Good afternoon, Your Honor. Derek Li appearing with Alphonso Vonn, who is present.

* * * * *

[12] THE COURT: Mr. Li, are you in position to do anything with Mr. Vonn?

MR. LI: May I have just a moment, Your Honor?

THE COURT: Yes.

DEFENDANT VONN: Excuse me, Your Honor, may I speak on my behalf, please?

THE COURT: All right.

DEFENDANT VONN: I'm not quite understanding what he's trying to—what's the information given to me, because I don't know nothing about the system. So I don't really know—understand what he is saying.

[13] THE COURT: Maybe you ought to take some more time to talk to him. You can either talk—I can handle it later in the afternoon or next Monday, Mr. Li.

MR. LI: Your Honor, I would request later this afternoon, would be sufficient. I just need more time to talk to my client.

THE COURT: Okay. Sit down and talk to him some more then. Explain things to him. I'll call it later.

(Unrelated matters reported, not transcribed herein.)

THE CLERK: Item No. 4, CR-233-JMI, United States of America versus Alphonso Vonn.

Counsel.

MS. LU: Your Honor, once again, Elaine Lu appearing on behalf of the United States.

MR. LI: Good afternoon, Your Honor. Derek Li appearing with Alphonso Vonn.

Your Honor, I understand that Mr. Vonn wants to go ahead with the change of plea. I'm not prepared to go forward. I believe I need to talk to my client further before we can go forward with a change of plea.

THE COURT: Okay.

Vonn, you don't want to rush it now. If your attorney wants to look at all the details—another week is not going to make any difference to you. The time will count. You'll get credit for the time. You won't have to do any more time for the [14] week. Give him a chance to look at it and make sure it's all signed and sealed and done the way he thinks it ought to be. Always in your best interest to do that. He's a good lawyer. Listen to him and don't be rushing in if he is not ready.

DEFENDANT VONN: He came down to see me last week, so I think that what we discussed before today—

THE COURT: Let's give him a week to get this all wrapped up, and we'll take it next Monday at 1:30. I'll calendar it for a further status conference at 1:30, Monday, the 12th.

Yes, sir?

DEFENDANT VONN: Is it mandatory that we postpone this?

THE COURT: If he is not ready, I hesitate to go forward over your attorney's objections. That complicates things, Mr. Vonn. I know you want to get it over with, but let's wait one more week. Make sure it's done

to your attorney's satisfaction. It can only be to your benefit. It's not going to hurt you. It can only be to your benefit. And the week counts.

DEFENDANT VONN: Is there any way I can change my defense right here, get a new lawyer or something?

THE COURT: You can hire one if you have the money. But you'd have to give me a good reason to fire this one. And I don't see any good reason for it.

DEFENDANT VONN: Because he's not explaining everything [15] to me right.

THE COURT: That is why he wants some more time to do it. That is exactly what he wants, is time to explain things and to review it, make sure it's all done properly.

DEFENDANT VONN: I understand that, Your Honor.

THE COURT: You have confidence in him. He'll do a good job for you.

DEFENDANT VONN: He comes down to see me a lot, and it's still not adding up.

THE COURT: I'm sure it will all be clear you to by next Monday.

Monday the 12th at 1:30 for further status conference.

MR. LI: Thank you, Your Honor.

MS. LU: Thank you, Your Honor.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 96-233-JMI

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALPHONSO VONN, DEFENDANT

STATUS CONFERENCE

[May 12, 1997]

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[3] THE CLERK: No. 17, U.S.A. versus Alphonso Vonn.

Counsel, please come forward.

MS. LU: Good afternoon, Your Honor. Elaine Lu appearing on behalf of the United States.

THE COURT: Good afternoon.

MR. LI: Good afternoon, Your Honor. Derek Li appearing with Alphonso Vonn, who is present.

THE COURT: Good afternoon, Counsel.

Mr. Li, what have you decided to do with your client's case?

MR. LI: Your Honor, the Government has charged Mr. Vonn with a two-count indictment. Mr. Vonn is prepared to enter a guilty plea to Count One, which is armed bank robbery.

THE COURT: Agreeable to the Government?

MS. LU: Yes, your Honor.

THE COURT: Mr. Clerk, please swear the defendant.

MS. LU: Although, Your Honor, the Government would still be prepared to proceed to trial with Count Two.

THE COURT: Oh.

Is that your understand, Counsel? Do you and your client understand that the Government wants to pursue the gun allegation apparently?

[4] MR. LI: Yes, I do, Your Honor—

THE COURT: The Government's position is that Mr. Vonn personally used a firearm, right?

MS. LU: Yes.

THE COURT: And he doesn't want to admit that. So he would be admitting the armed bank robbery and admitting that somebody in the group used a gun but not necessarily it was he, right?

MR. LI: Yes, Your Honor. Can I have a moment, Your Honor?

THE COURT: Yes.

(Pause in the proceedings.)

MR. LI: We will proceed, Your Honor.

THE COURT: Is there really any point in taking this plea? If we're going to go through a whole, the jury is going to have to hear the whole case anyway then to figure out whether or not he used a gun.

MR. LI: I understand, Your Honor. But it's my client's desire to plead guilty to Count One.

THE COURT: Of course, it could help him with acceptance of responsibility if he pleads.

Well, all right. I'm sorry, Mr. Clerk. Did you swear him?

THE CLERK: No.

THE COURT: All right. Swear the defendant.

[5] THE CLERK: Sir, please raise your right hand to be sworn.

You do solemnly swear that the answers you will give to the Court's questions will be the truth, the whole truth, and nothing but the truth, so help you God?

THE DEFENDANT: Yes.

THE CLERK: Please state your name.

THE DEFENDANT: Alphonso Vonn.

THE COURT: Mr. Vonn, did you hear what your attorney and the Government attorney said?

THE DEFENDANT: Yes.

THE COURT: Do you still want to plead guilty to armed bank robbery, Count One?

THE DEFENDANT: Yes.

THE COURT: And you understand the Government still wants to try you on Count Two, which is an allegation that you personally used a firearm during the robbery.

Do you understand that?

THE DEFENDANT: Excuse me?

THE COURT: They want to try you on—they think you personally used a gun.

THE DEFENDANT: I understand.

THE COURT: And they want to try you on that charge, and they'll be able to do that.

Do you understand that?

[6] THE DEFENDANT: Yes.

THE COURT: Is there a written plea agreement here? I don't seem to have it if there is.

MS. LU: There is, Your Honor. It hasn't been filed because it hasn't been executed.

THE COURT: It hasn't been signed yet?

MS. LU: No. The plea offer that the Government offered requires the defendant to plead guilty to Count Two.

THE COURT: This isn't the plea agreement that you offered. This is something else?

MS. LU: Yes.

THE COURT: All right, Mr. Vonn, if you plead guilty to Count One you're going to be incurring certain penalties.

Would you tell him what the maximum penalty is for Count One, please, Counsel.

MS. LU: For conviction of 18 U.S.C., section 2113 (a) and (d): Twenty-five years of incarceration and a five-year period of supervised release; a fine of $250,000; and a special assessment of $100.

THE COURT: Are you finished?

MS. LU: Yes, Your Honor.

THE COURT: Tell him what the legal elements of the crime are that you would have to prove for him to be convicted of Count One.

MS. LU: In order to be guilty of violating 18 U.S.C. [7] sections 2113 (a) and (d), defendant must have taken money from a person belonging to a bank whose deposits were then insured by the Federal Deposit Insurance Corporation, through the use of force and violence or intimidation and must have deliberately assaulted the person or put the person—life of the

person in danger by use of a dangerous weapon or device.

THE COURT: Mr. Vonn, do you understand all that?

THE DEFENDANT: Yes.

THE COURT: I can't tell you at this time what your sentence is going to be. I have to get a probation report, and, of course, it's going to be important whether you're convicted of the other count, what your sentence is going be.

But I make you no promises, and I will not let you withdraw your guilty plea because you don't like the sentence.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Are you doing this freely and voluntarily?

THE DEFENDANT: Yes.

THE COURT: Counsel, have you conferred with your client and—

MR. LI: Yes, I have, Your Honor.

THE COURT: All right.

Mr. Vonn, you'll be giving up, as to Count One, you'll be giving were certain rights which you enjoy if you plead guilty because you don't have to plead guilty; and your rights [8] are as follows: You have a right against

self-incrimination, and you will incriminate yourself if you plead guilty to this count.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You have a right to a trial, by a jury or by a judge without a jury, in Count One.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You have a right to confront and cross-examine witnesses who would testify against you.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You have a right to present evidence on your own behalf at your trial.

Do you understand that?

THE WITNESS: Yes.

THE COURT: Do you waive your rights?

THE DEFENDANT: Yes.

THE COURT: Counsel, do you join in the waivers?

MR. LI: Yes, your Honor.

THE COURT: Do you believe there is a legal and a factual basis for the plea Count One?

MR. LI: Yes, your Honor.

THE COURT: All right.

[9] Mr. Vonn, in order for me to accept your plea, I have to have an admission from you—or a statement from you as to what happened here.

Counsel for the Government, would you please tell the Court what you would prove if this case went to trial. Omit any allegation that the defendant personally used a firearm because he's contending that he didn't. But I think it's sufficient if you can indicate that somebody may have used a firearm.

Listen to what she says, Mr. Vonn, and see if can you agree with that as far as what you did.

MS. LU: On February 27th, 1997, at approximately 10:00 a.m., defendant Alphonso Vonn, along with James Andre Cox and Gregory Li Turner, entered Farmers and Merchants Bank, located at 1401 Long Beach Boulevard, Long Beach, California.

Once inside the bank, defendants yelled, "This is a holdup. Get down. Get down."

While Cox and Turner pointed handguns at tellers and customers, defendant Vonn vaulted over the counter —"

THE COURT: Wait, wait. While what?

MS. LU: While co-defendants Cox and Turner pointed handguns at tellers and customers, defendant Vonn vaulted over the counter, demanded money while using a dangerous weapon at a victim teller and directed the victim teller to place money into a large canvas bag.

Defendant Vonn then took money belonging to Farmers and [10] Merchants Bank totalling approximately $209.

At the time of the robbery, Farmer and Merchants Bank was a federally insured financial institution.

At the time of the robbery, defendant's fellow bank robberies each carried a gun and used the gun during the bank robbery. The guns included a loaded an operational .380 caliber semiautomatic pistol; a loaded and operational .357 caliber revolver.

THE COURT: Is that acceptable, Mr. Vonn?

MR. LI: Your Honor, first of all, Mr. Vonn will object to the naming of other defendants, specifically Mr. Cox and Mr. Turner. I think he would admit that he and others went inside the bank—

THE COURT: All right. He doesn't want to be in a position of informing on them, right?

MR. LI: Yes, your Honor.

THE COURT: Will he admit that somebody used a gun?

MR. LI: Yes, your Honor.

THE COURT: Is that right, Vonn?

THE DEFENDANT: Yes.

THE COURT: All right. That's sufficient.

MR. LI: Your Honor, I would also object to the proffer by the Government regarding when Mr. Vonn

vaulted over the counter and demanded money that he had a deadly weapon pointed at a victim teller. He will admit that he vaulted over the [11] counter and demanded money.

THE COURT: All right. I note that, and I accept it without the deadly weapon allegation because I understand that is disputed.

Otherwise, do you accept that, Mr. Vonn?

THE DEFENDANT: Yes.

THE COURT: Counsel, you agree?

MR. LI: Yes, your Honor.

THE COURT: All right. The Court finds a legal and a factual basis for the plea; the Court finds that the waivers of the Constitutional Rights are freely, voluntarily, and intelligently made; the Court finds the plea is provident.

Alphonso Vonn, to the indictment, armed bank robbery, Count One, how do you plead, sir?

THE DEFENDANT: Guilty.

THE COURT: Guilty Plea is accepted by the Court.

We have to put the matter over a little longer, Counsel, because we have to have a trial on the other count, which won't occur until June, at the earliest.

How about a September date for sentencing? By the time we have the trial on the other count, and we let

the probation officer then get the case, that will be about something like 10 or 12 weeks after the trial.

Is that agreeable?

MR. LI: Yes, Your Honor.

THE COURT: Sentencing in this case will be set for Monday, September 15, at 1:30.

Now I want to set a date for the trial on the second count. Do you have a case on him on the second count? Do you have a case on Vonn on the second count?

MS. LU: Yes, your Honor.

THE COURT: Are we wasting our time, or can you really prove he personally used a gun?

MS. LU: Yes, your Honor. The Government expects to prove this at the time of trial.

THE COURT: What evidence do you have?

MS. LU: Victims, victim tellers at the bank. Eye-witnesses.

THE COURT: Victims are going to say he had a gun?

MS. LU: Yes, Your Honor.

THE COURT: All right. How about—

MR. LI: Your Honor—

THE COURT: Let's see. Jury trial is set for June 10th. We can just leave it on the calendar for June 10th, then, for trial.

MR. LI: Yes, your Honor.

MS. LU: Very well.

THE COURT: That will be the order then. The trial will remain as set for June 10th, on Count Two, and the sentencing date will remain as set by the Court.

We'll see you back here on June 10th.

MR. LI: Thank you, Your Honor.

MS. LU: Thank you, Your Honor.

THE COURT: Thank you, Counsel.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 96-233-JMI

HONORABLE JAMES M. IDEMAN,
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ALPHONSO VONN AND GREGORY LEE TURNER,
DEFENDANTS

STATUS CONFERENCE

Monday, June 9, 1997

THE CLERK: Item No. 15, CR 97-233-JMI, United States of America versus Alphonso Vonn and Gregory Lee Turner.

Counsel.

MS. LU: Good afternoon, Your Honor. Elaine Lu appearing on behalf of the United States.

MR. LI: Good afternoon, Your Honor. Derek Li appearing with Alphonso Vonn, who is present.

MR. DEITCH: Phillip Deitch appears with Mr. Turner. He is before the Court.

THE COURT: I have been informed counsel are in trial and have agreed upon a date for the re-trial—sorry—for the trial. The date which has been agreed to is August the 12th.

Is that agreeable with you, Mr. Turner?

DEFENDANT TURNER: Yes, sir.

THE COURT: Mr. Vonn?

DEFENDANT VONN: Yes.

THE COURT: That will be the order. The Court will ask the marshal to see if it's possible to continue to house the defendants at the MDC pending trial.

That was your request, was it not?

MR. LI: Yes, it is, Your Honor.

THE COURT: Thank you.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 97-233-(A)-JMI

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALPHONSO VONN AND GREGORY LEE TURNER,
DEFENDANTS

FIRST SUPERSEDING INDICTMENT

(18 U.S.C. § 371: Conspiracy; 18 U.S.C. § 2113(a)(d): Armed Bank Robbery; 18 U.S.C. § 2(a): Aiding and Abetting; 18 U.S.C. § 924(c): Using and Carrying a Firearm During a Crime of Violence)

[May 1997 Grand Jury]

The Grand Jury charges:

COUNT ONE

[18 U.S.C. § 371]

A. OBJECTS OF THE CONSPIRACY

Beginning on an unknown date and continuing to on or about February 27, 1997, in Los Angeles County, within the Central District of California, defendants,

ALPHONSO VONN and GREGORY LEE TURNER, and others known and unknown to the Grand Jury, including co-conspirator James Andre Cox, conspired and agreed with each other to knowingly and intentionally commit bank robbery of the Farmers and Merchants Bank ("the Bank"), 1401 Long Beach Blvd., Long Beach, California, in violation of Title 18, United States Code, Section 2113(a).

B. MEANS BY WHICH THE OBJECT OF THE CONSPIRACY WAS TO BE ACCOMPLISHED

The object of the conspiracy was to be accomplished in substance as follows:

1. Defendants VONN and TURNER and co-conspirator Cox would each carry a handgun and enter the Bank together.

2. Defendant VONN would vault over the teller counter and demand money at gunpoint from the tellers.

3. Defendant TURNER and co-conspirator Cox would point handguns at tellers and customers.

4. Defendant VONN would flee from the Bank with the stolen money and enter a get-away vehicle.

5. Defendant TURNER and co-conspirator Cox would flee from the Bank and enter a get-away vehicle together with defendant VONN.

6. Co-conspirator Cox would drive defendants VONN and TURNER away from the Bank with the stolen money.

C. OVERT ACTS

In furtherance of the conspiracy and to accomplish the object of the conspiracy, on or about February 27, 1997, defendants VONN and TURNER and co-conspirator Cox, and others known and unknown to the Grand Jury, committed various overt acts within the Central District of California, including but not limited to the following:

1. Defendants VONN and TURNER and co-conspirator Cox entered the Farmers and Merchants Bank at 1401 Long Beach Blvd., Long Beach, California together.

2. Defendant VONN possessed a gun while in the Farmers and Merchants Bank.

3. Defendant TURNER possessed a gun while in the Farmers and Merchants Bank.

4. Co-conspirator Cox possessed a gun while in the Farmers and Merchants Bank.

5. Defendant VONN vaulted over the teller counter.

6. Defendant VONN pointed a gun at Farmers and Merchants Bank teller Audra Greer.

7. Defendant VONN demanded money from Farmers and Merchants Bank teller Audra Greer.

8. Defendant VONN pointed a gun at Farmers and Merchants Bank teller Lorida Lee Parker.

9. Defendant VONN demanded money from Farmers and Merchants Bank teller Lorida Lee Parker.

10. Defendant VONN took money belonging to Farmers and Merchants Bank.

11. Defendant TURNER and co-conspirator Cox pointed guns at customers and tellers in the Farmers and Merchants Bank.

12. Defendants VONN and TURNER and co-conspirator Cox ran out of the Farmers and Merchants Bank.

13. Defendants VONN and TURNER and co-conspirator Cox jumped into a white van.

14. Co-conspirator Cox drove the white van away from the bank with defendants VONN and TURNER.

COUNT TWO

[18 U.S.C. § 2113(a)(d); 18 U.S.C. § 2(a)]

On or about February 27, 1997, in Los Angeles County, within the Central District of California, defendant GREGORY LEE TURNER, and ALPHONSO VONN and James Andre Cox, aiding and abetting each other, by force, violence and intimidation, knowingly took from the person or presence of another approximately $209.00 belonging to and in the care, custody, control, management, and possession of Farmers and Merchants Bank, 1401 Long Beach Boulevard, Long Beach, California, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

In committing said offense, defendants assaulted and put in jeopardy the life of victim teller Lorida Lee Parker and others by using a gun, a dangerous weapon and device.

COUNT THREE

[18 U.S.C. § 924(c)]

On or about February 27, 1997, in Los Angeles County, within the Central District of California, defendants ALPHONSO VONN and GREGORY LEE TURNER, and James Andre Cox, knowingly used and carried a firearm, namely, a handgun, during and in relation to a crime of violence, namely, armed bank robbery and conspiracy to commit bank robbery of Farmers and Merchants Bank, 1401 Long Beach Boulevard, Long Beach, California, in violation of Title 18, United States Code, Sections 2113(a)(d) and 371.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 96-233(A)-JMI

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALPHONSO VONN, DEFENDANT

CHANGE OF PLEA

[September 3, 1997]

Before: Honorable James M. Ideman, United States District Judge.

[3] THE CLERK: Number two, CR 97-233(A)-JMI, United States of America versus Alphonso Vonn.

Counsel, appearances, please.

MS. LU: Good afternoon, Your Honor. Elaine Lu on behalf of the United States.

MR. LI: Good afternoon, Your Honor. Derek Li appearing with Alphonso Vonn, who is present.

THE COURT: What is the plea agreement here?

MR. LI: There's no plea agreement, but Mr. Vonn is going to plead to Count One and Three of the first superseding indictment.

THE COURT: Is that agreeable to the Government?

MS. LU: Yes, your Honor.

THE COURT: Swear the defendant, please.

THE CLERK: Sir, the judge is going to ask you some questions. You need to be put under oath. Would you please raise your right hand.

Do you solemnly swear that the questions put to you will be the truth, the whole truth, and nothing but the truth, so help you God?

THE DEFENDANT: Yes, ma'am.

[4] THE COURT: Mr. Vonn, are you pleading guilty freely and voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: Anybody force you to do this?

THE DEFENDANT: No, sir.

THE COURT: Would the Government inform Mr. Vonn as to what you'd have to prove on those two counts to authorize his guilty plea and also what the maximum punishment would be.

MS. LU: Yes, your Honor.

In order for defendant to be guilty of violating 18 U.S.C. section 371, which is Count One, the Government must prove each the following elements beyond a reasonable doubt: That defendant Vonn conspired and

agreed with Gregory Lee Turner and James Andre Cox to commit armed robbery of a Farmers and Merchants Bank, at 1401 Long Beach Boulevard, Long Beach, California; two, that defendant Vonn became a member of the conspiracy knowing at least one of its objects and intending to help accomplish it; and, three, in furtherance of the conspiracy, one of the members of the conspiracy must have committed an overt act within the Central District of California.

In order for the defendant to be proven guilty of Count Three, violating 18 U.S.C. section 924(c), the Government must prove each of the following elements beyond a reasonable doubt:

One, defendant Vonn committed the armed robbery of [5] Farmers and Merchants bank at 1401 Long Beach Boulevard, and two, that defendant Vonn knowingly used or carried a firearm during and in relation to that armed robbery.

Alternatively, defendant Vonn may be held vicariously liable under a *Pinkerton* theory, which is a co-conspirator's reasonable and foreseeable use or carrying of a firearm in furtherance of their conspiracy.

In order for the defendant to be guilty of 18 U.S.C. 924(c) under this theory, the Government must prove each of the following elements beyond a reasonable doubt: That the firearm was used or carried in furtherance of the conspiracy to commit armed robbery; that the use or carrying of a firearm was within the scope of the conspiracy to commit armed robbery; and that defendant Vonn could reasonably have foreseen that it was a necessary or natural consequence of the

conspiracy to commit armed robbery that one of the participants would use or carry a firearm.

The statutory maximum sentences that the Court can impose are as follows. For conviction of 18 U.S.C. section 924(c): A five-year period of incarceration or a 20-year period of incarceration if defendant was previously convicted of a violation of 18 U.S.C. section 924(c), plus a three-year period of supervised release, a fine of $250,000, and a special assessment of $100.

For conviction of 18 U.S.C. section 371: 20 years [6] incarceration, three-year period of supervised release, $250,000 fine, and a special assessment of $100.

Accordingly, the total maximum sentence for the offenses to which defendant Vonn is pleading guilty, plus the offense to which he has already plead had guilty, is 50 years incarceration, assuming that he's not previously been convicted of violation 18 U.S.C. section 924(c), plus an 11-year period of supervised release, a fine of $750,000, and a special assessment of $300.

Your Honor, may I inform the defendant of the mandatory minimum sentence?

THE COURT: Right.

MS. LU: For conviction of 18 U.S.C. section 924(c), the mandatory minimum sentence is five years incarceration, or 20 years incarceration if the defendant is previously convicted of a violation of 18 U.S.C. section 924(c). This sentence imposed pursuant to section 924(c) must run consecutive to any other sentence that the defendant receives for his violation of 18 U.S.C. section 371 and 2113.

THE COURT: Vonn, those are the maximum sentences. You won't get the maximum sentence, I'm sure, but you'll get a sentence that I determine is something that is consistent with the Sentencing Guidelines. I don't have any idea right now what that will be. I don't know enough about you or what you did here. But I won't let you withdraw your guilty plea because you [7] don't like the sentence.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: There was a previous plea in this case, wasn't there?

MS. LU: Yes, there was, Your Honor. The defendant has already pleaded guilty to armed bank robbery. Today he is entering his guilty plea to conspiracy, as well as 924(c), carry—use and carrying a firearm during that—

THE COURT: Which count did he plead to before?

MS. LU: Armed bank robbery, the substantive count, Your Honor.

THE COURT: Which count?

MS. LU: That was Count One of the original indictment.

THE COURT: This is the superseding indictment?

MS. LU: Yes, it is, your Honor.

THE COURT: All right.

Mr. Vonn, you'll be giving up certain rights which you enjoy if you plead guilty. They are as follows:

You have the right not to incriminate yourself, and you will incriminate yourself if you plead guilty.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You have the right to a trial by a judge or by a jury.

[8] Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You have the right to confront and cross-examine witnesses who may testify against you at your trial.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You have the right to present evidence on your own behalf at your trial.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you waive your rights?

THE DEFENDANT: Yes, sir.

THE COURT: Counsel, do you concur in the waivers of the Constitutional Rights?

MR. LI: Yes, I do.

THE COURT: Do you believe there's a legal and a factual basis for the plea?

MR. LI: Yes, your Honor.

THE COURT: Mr. Vonn, for me to accept your guilty plea, I have to have a little detail from you as to what actually happened here. The easiest way is for the U.S. Attorney to tell me what the evidence would be at your trial, if there was a trial. Listen to what she says and see if that is your understanding of what happened.

[9] MS. LU: All right, Your Honor.

On February 27, 1997, at approximately 10:00 a.m., the defendant, Alphonso Vonn, with co-defendants James Andre Cox and Gregory Lee Turner, entered Farmers and Merchants Bank, located at 1401 Long Beach Boulevard, Long Beach, California.

Before entering the bank, Defendant Vonn had agreed with Turner and Cox to commit armed robbery at the bank. Defendant Vonn knew that Cox and Turner would actively display their guns in the commission of this bank robbery.

Once inside the bank, defendant Vonn yelled words to the effect of, "This is a holdup. Get down."

While Cox and Turner pointed handguns at tellers and customers, defendant Vonn vaulted over the counter, demanded money at gunpoint from the victim teller and directed the victim teller to place money into a large canvas bag.

Defendant Vonn saw Cox and Turner pointing their guns at tellers and customers to hold them at bay while

he, defendant Vonn, continued to demand money from the victim teller.

Defendant Vonn then took approximately $209 belonging to Farmers and Merchants Bank and ran out of the bank with Cox and Turner.

At the time of the robbery the deposits of the Farmers and Merchants Bank were insured by the FDIC.

Defendant Vonn and his fellow bank robbers, Cox and Turner, each carried and used a gun by brandishing it during the [10] robbery. The guns included a loaded and operational .380 caliber semiautomatic pistol and a loaded and operational .357 caliber revolver.

The Government would have proven these facts through the testimony of victim tellers, surveillance photographs of excellent quality, evidence that all $209 of bait money was recovered from defendant Vonn's sock after a high-speed pursuit from the bank, and, finally, defendant Vonn's post-arrest Mirandized statement.

THE COURT: Is that the way it was, Vonn?

THE DEFENDANT: The bank robbery, sir, but not the guns. I didn't know they were carrying weapons until we entered the bank, sir.

THE COURT: Other than that, you agree?

THE DEFENDANT: Yes—and I wasn't the one who yelled, "Get down," but everybody else is true, Your Honor.

THE COURT: Okay.

The Court finds a factual basis for the plea. The Court finds the waivers of the Constitutional Rights are freely, voluntarily, and intelligently made. The Court finds that the pleas are provident.

MS. LU: Your Honor?

THE COURT: What?

MR. LU: If we could—I don't know remember hearing the Court inform the defendant of his right to assistance of [11] counsel.

THE COURT: I didn't because is represented by counsel.

How do you plead to Counts One and Three, Mr. Vonn?

THE DEFENDANT: Guilty, Sir.

THE COURT: The guilty plea is accepted by the Court.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR-97-233(A)-JMI

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALPHONSO VONN, DEFENDANT

DEFENDANT'S MOTION FOR WITHDRAWAL OF GUILTY PLEA AS TO COUNT III

[June 8, 1998]

BEFORE: HONORABLE JAMES M. IDEMAN
UNITED STATES DISTRICT JUDGE.

[4] THE CLERK: Item No. 22, CR-97-233(a)-JMI, United States of America versus Alfonso Vonn.

Counsel, please state your appearances.

MS. LU: Good afternoon, Your Honor. Elaine Lu appearing for the United States.

MR. LI: Good afternoon, Your Honor. Derek Li appearing with Alfonso Vonn who is present.

THE COURT: All right. There is a motion pending for the defendant to withdraw his guilty plea. I read your motion and I read the government's opposition.

Is that matter submitted?

MR. LI: No, Your Honor. I would like to respond to the Government's arguments, if I may.

THE COURT: Keep it brief if you would.

MR. LI: Yes, Your Honor. The Government's argument is that Mr. Vonn has not shown that he plead—that the wish to withdraw his guilty plea was ignorance, fear and inadvertent [*sic*]. What happened here, your Honor, is Mr. Vonn plead guilty due to a mistake. He factually believed that he was not guilty of 924(c) and he plead guilty to it. And what's most telling in this case, it does not achieve [5] heart on Mr. Vonn's heart. [*sic*] What's most telling is that we reviewed the transcripts of this case. When he plead guilty to the armed bank robbery, one of the specific objections that the defense made was whether or Mr. Vonn actually carried a gun inside the bank.

THE COURT: And but wasn't that aiding and abetting others in doing so?

MR. LI: Yes, your honor. And during the second change of plea for 924(c), specifically, the government went into a long recitation of facts and the recitation does say something about the fact that the defendant Vonn and the other defendants each carried and used a gun. But, your honor, I think the context of an enormous representation of facts sometimes the defendant may not listen as carefully as he should have, but was trying to—the judgment he made to the Court

was that going to the bank the first time that he knew about the bank and that he knew about the guns carried by co-defendants.

What it indicates is that it wasn't until Mr. Vonn actually entered the van that the gun was being used. And what he is saying to the court, your honor, is number 1, he did not have the gun, even though the government intends to put on tellers to [6] indicate that that gun was seen in Mr. Vonn's hands. He didn't know about the guns until the time of the bank robbery.

Now while under the Pinkerton theory or under the conspiracy theory that a person can reasonably foresee the other defendants had used the gun, that person can be liable for 924(c). That is really a jury question as to what is reasonably foreseeable. While there may be factual basis for the court, would there be a factual basis for the government to seek permission, that what he is saying he was mistaken?

He was factually not guilty of the offense; and therefore, he is not to depart. [*sic*] He is basically raising before the Court, he made a mistake in the plea, and we would ask the Court to allow him to withdraw his plea.

THE COURT: All right. The court finds that the defendant under oath clearly, fairly indicated his guilt on this count. The court has read the supporting documents, including the probation report. It's clear that the people involved in this all used guns. The intention of the defendant that he didn't use the gun, he didn't know that anyone else was going to use the gun was [7] clearly—clearly not tenable.

And in addition to that, the government has indicated that the disadvantage by any change of this late date, that the motion to withdraw the—the plea is untimely, and that the government will be damned if they have to have a retrial. But it's just as clear as can be that all parties prepared to use guns, and so did the defendant. So the defendant's motion of withdrawing his guilty plea is denied.

Supreme Court, U.S.
FILED
JUL 13 2001
OFFICE OF THE CLERK

No. 00-973

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ALPHONSO VONN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR ALPHONSO VONN

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QUESTIONS PRESENTED

1. Whether a defendant's challenge to his guilty plea based on a violation of Federal Rule of Criminal Procedure 11 is subject to plain-error review under Rule 52(b) if he failed to object to the violation in the district court.

2. Whether the nature of prejudice to be assessed when a guilty plea is taken in violation of Rule 11 is whether the defendant would have pleaded guilty absent the error.

3. Whether, in determining the existence of prejudice when a guilty plea has been taken in violation of Rule 11, the reviewing court is restricted to the transcript of the Rule 11 colloquy or may consider other matters.

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The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 224 F.3d 1152. A prior opinion, withdrawn and modified upon rehearing, is reported at 211 F.3d 1109.

JURISDICTION

The court of appeals initially entered judgment on April 20, 2000. Judgment on rehearing was entered on September 14, 2000. The petition for writ of certiorari was filed on December 13, 2000, and granted on February 26, 2001. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

The relevant provisions of Rules 11 and 52 of the Federal Rules of Criminal Procedure are reproduced in the Appendix.

STATEMENT OF THE CASE

Alphonso Vonn was 21 years old when he was arrested for the first time in his life, placed into custody, and charged with serious felonies. He had a difficult time understanding the proceedings or his attorney; he asked questions often and expressed frustration frequently. Eventually, he pleaded guilty to all the charges against him, although the record is clear that he did not always act with a full understanding of the proceedings.

On February 27, 1997, Vonn was arrested on a criminal complaint that charged him and two others with armed bank robbery and the use of a firearm during a crime of violence. 18 U.S.C. §§ 2113(a)(d), 924(c); JA 12-13. The following day Vonn, and several other arrestees charged in unrelated complaints, made an initial appearance before a magistrate judge. Before calling the calendar to arraign the individual defendants on the complaints against them, the magistrate made a statement collectively to all the defendants present. He explained that they were in court because they had been charged with a criminal offense and that they either should have received or would receive a copy of the formal papers charging them. He set forth some of the constitutional and statutory rights held by criminal defendants, including the right to retained counsel, the right to appointed counsel if one could not afford retained counsel,[1] the obligation to tell the truth on any financial declaration, the right to remain silent, the right to a determination of bail and several other rights regarding detention, the right to a preliminary hearing or grand jury proceeding (including an explanation of what a grand jury is), and the rights involved in cases arising out of other judicial districts. JA 14-17.

When Vonn's turn came to be arraigned, the magistrate asked him if he had been present when the rights had been given and if he had heard and understood

[1] Although the magistrate advised the defendants that they had the right to representation by retained counsel at every stage of the proceedings, he did not make that express advisement as to appointed counsel.

them. Vonn answered, "Yes, sir." The Public Defender was appointed to represent Vonn. JA 17-18.

The grand jury returned an indictment on March 14, 1997, charging Vonn with armed bank robbery and the use of a gun. On March 17, 1997, Vonn and several other defendants indicted in unrelated cases appeared before a district judge for post-indictment arraignment. As the magistrate had done, the district court judge made comments to the defendants collectively before calling them individually to arraign them. The judge told the defendants that they were present in court because they had been indicted and that they would receive a copy of the indictment and then be called upon to plead. She told the defendants that they had the right to a trial (jury trial or judge trial, public trial and speedy trial), that they had the right to be represented by counsel at all stages of the proceedings, that counsel would be appointed if they could not afford to retain one, that a financial affidavit would be required and any false statement on the form could result in further prosecution, that they had the right to confront, cross-examine and subpoena witnesses, that they had the right to a determination of bail, that the burden would be on the government to prove their guilt beyond a reasonable doubt, that a district court judge would preside at all further proceedings, that motions had to be made before the judge, and that codefendants would be assigned to the same judge. She also advised of the duty of a private attorney seeking to represent any defendant and the obligations of all attorneys to make and arrange for appearances. JA 21-24.

When Vonn's turn came to be arraigned, he appeared with counsel, who noted that Vonn had signed and counsel had filed a written advisement of constitutional rights.

The judge then addressed Vonn to determine that he had heard and understood the statements that she had earlier made, that he had received a copy of the indictment and that he did not wish the indictment read to him. The judge then assigned the matter to a particular district court judge for further proceedings. The judge never actually arraigned Vonn, never asking him how he wished to plead. JA 24-25.

On May 5, 1997, a status conference was held in the matter. By that point, both of Vonn's codefendants had signed plea agreements with the government. The judge asked Vonn's lawyer what Vonn was going to do; when the lawyer asked for a minute, Vonn asked to speak on his own behalf. Vonn told the judge: "I'm not quite understanding what he's [counsel's] trying to – what's the information given to me, because I don't know nothing about the system. So I don't really know – understand what he is saying." The judge responded by telling Vonn to talk further with his lawyer, and a recess was taken. JA 30-31.

After the break, Vonn's lawyer indicated that Vonn was prepared to go forward with a change of plea but that he, the lawyer, was not. The judge advised Vonn that going forward without his lawyer's agreement would "complicate[ ] things." Vonn then asked if he could get a new lawyer. The judge responded: "You can hire one if you have the money. But you'd have to give me a good reason to fire this one. And I don't see any good reason for it." Vonn again told the judge, "[H]e's not explaining everything to me right. . . . He comes down to see me a lot, and it's still not adding up." The judge summarily put the matter over a week, telling Vonn that he was "sure it will all be clear [to] you by next Monday." JA 32-33.

The next Monday, May 12, 1997, Vonn pleaded guilty to armed bank robbery. The court failed to advise him of his right to counsel if he went to trial. Vonn expressly objected to the government's recitation of the factual basis for the plea insofar as it stated that Vonn had a gun in the bank. Vonn did not plead guilty to the use of a gun; trial was set for that count. JA 34-45.

In August, the government obtained a superseding indictment, adding a count of conspiracy to the bank robbery and gun use counts. On September 3, 1997, Vonn pleaded guilty to the conspiracy and gun use counts. Again, the court forgot to advise Vonn that he had the right to counsel at a trial. This time, the prosecutor brought the failure to the court's attention: "I don't remember hearing the Court inform the defendant of his right to assistance of counsel." The judge responded: "I didn't because he is represented by counsel." JA 61.

The government set forth facts that it believed it could prove at a trial for the factual basis of the plea. Those facts included that Vonn planned the robbery with two others and that he knew that his accomplices would actively display guns in the course of the robbery, and in fact that they did so. When the judge asked Vonn if that was the way the bank robbery occurred, Vonn responded: "The bank robbery, sir, but not the guns. I didn't know they were carrying weapons until we entered the bank, sir." The judge nevertheless found a factual basis for the plea to use of a weapon during a crime of violence. JA 59-60.

On May 14, 1998, Vonn moved to withdraw his plea. That motion was heard just before sentencing on June 8, 1998. Vonn's lawyer contended that Vonn had pleaded guilty to the use of a gun under a mistake, noting that

Vonn had consistently stated that he had not used a gun and he had been unaware that his accomplices had guns until they were already in the bank. The judge responded that he had read the probation report and it was "clear" that all three robbers had used guns, so Vonn's contention that he didn't know that guns were going to be used was "clearly not tenable." JA 62-65.

The judge then sentenced Vonn, a first-time offender, to prison for 97 months, the high end of the applicable Guidelines range. JA 8.

Vonn appealed the judgment. He challenged the validity of both his pleas, contending that both involved Rule 11 violations in the failure of the district court to advise him of his right to counsel at trial as required by Rule 11(c)(3). The government agreed that error had occurred and that the proper test for determining prejudice was harmless error under Rule 11(h). The government also agreed that the error was prejudicial unless the defendant had otherwise known of his right. The court of appeals vacated the pleas, holding that under Rule 11(h) the failure to advise Vonn of his right to counsel at trial was not harmless because the record did not establish that Vonn had known of his right.

On rehearing, the government argued for the first time that the appellate court should look to other proceedings to determine whether Vonn knew of his right to assistance of counsel at trial. But the government never challenged the application of Rule 11(h) or the nature of the prejudice until it filed for certiorari.

SUMMARY OF ARGUMENT

There are two ways under our system of criminal justice in which the factual guilt of a defendant may be established such that he may be deprived of his liberty consistent with the Due Process Clause. The first is by a verdict by a jury or judge, finding, after a trial providing all the rights set forth in the Fifth and Sixth Amendments, that the elements of the crime have been proven beyond a reasonable doubt. The second is by a plea of guilty: the defendant's own admission "in open court that he is in fact guilty of the offense with which he is charged." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Over 90 percent of federal criminal defendants whose cases are not dismissed plead guilty. *Mitchell v. United States*, 526 U.S. 314, 324 (1999).

Despite the fact that the vast majority of criminal defendants plead guilty and forego trials, this Court has addressed the requirements for a valid guilty plea, and the ramifications of an invalid plea, much less often than it has addressed the requirements for a fair trial. Still, both the Constitution and the Federal Rules of Criminal Procedure put limits on what will pass as a valid guilty plea.

To comport with due process, a plea must be both voluntary and intelligent, that is, it must be a *free* and *informed* choice among available alternatives. *North Carolina v. Alford*, 400 U.S. 25, 30 (1970). To make a genuinely informed choice, the defendant must know the nature of the charge he is admitting, the constitutional rights he is giving up by foregoing a trial, and the custodial consequences of a conviction. *Henderson v. Morgan*, 426 U.S. 637, 645 (1976); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Brady v. United States*, 397 U.S. 742, 755 (1998).

Rule 11 of the Federal Rules of Criminal Procedure sets forth the procedure to be used for the taking of guilty pleas in federal court. It places a duty on the district court to make specific advisements and inquiries personally of the defendant. The purpose of the rule is twofold: to ensure voluntary and intelligent pleas and to provide a complete record at the time the plea is entered of the factors relevant to the voluntariness and intelligence determination. *McCarthy v. United States*, 394 U.S. 459, 465 (1969).

The issues presented in this case involve the nature of appellate review of a plea taken in violation of Rule 11. The district court did not fulfill its duties under Rule 11 in taking Vonn's pleas: both times, the district court failed to advise Vonn of his right to counsel if he should go to trial. Neither Vonn nor his attorney brought the failure to the district court's attention, although the prosecutor did so during the second plea. Still, the district court failed to advise.

The government contends that the failure of Vonn or his attorney to object requires an appellate court to review the record for "plain error" under Rule 52(b). But, as Vonn will show, plain error is entirely inapplicable to Rule 11 violations. Rule 11 has its own harmless error provision, and any violation of Rule 11 rendering a plea involuntary or unintelligent is prejudicial per se.

The government contends that the prejudice relevant to a Rule 11 violation is whether the defendant would have pleaded guilty absent the violation. That test of prejudice, however, would entirely supplant voluntary and intelligent pleas with, what in the government's view or in an appellate court's view would be, wise pleas. The proper test of prejudice is whether the defendant actually

had the knowledge to make his plea intelligent. If the record does not show that he did, his plea is unintelligent and cannot stand.

Finally, the government contends that a reviewing court should be able to go outside the record of the plea colloquy in determining whether the plea was voluntary and intelligent. But a plea must be voluntary and intelligent *at the time it is made*. It makes no sense to allow prior or subsequent events to be considered in determining the defendant's state of mind and knowledge at the time the plea was made, and Rule 11 contemplates consideration of only the plea colloquy in appellate review of pleas.

Criminal convictions have lifelong effects on those convicted. They usually result in immediate prison terms, they often result in many years of adverse social and employment consequences, and they frequently result in lengthy enhancements to subsequent prison terms. Yet in recent years, Congress and this Court have severely restricted the ability of a defendant to collaterally challenge a prior conviction. *See, e.g.*, Antiterrorism and Effective Death Penalty Act of 1996; *Daniels v. United States*, 121 S.Ct. 1578 (2001); *Custis v. United States*, 511 U.S. 485 (1994). Since most of these convictions are based on guilty pleas, a proper respect for the administration of justice requires that all due care and concern be taken to ensure that the pleas are valid in the first instance. The rules proffered by the government would allow judgment to be entered upon unintelligent pleas and then those pleas would be insulated from any meaningful review thereafter. That is constitutionally unacceptable.

ARGUMENT

THE DISTRICT COURT'S FAILURE TO ADVISE RESPONDENT OF HIS RIGHT TO COUNSEL IF HE WENT TO TRIAL, AS REQUIRED BY RULE 11(c)(3), RENDERS RESPONDENT'S PLEAS UNINTELLIGENT AND ENTITLES HIM TO OBTAIN THE RELIEF OF HAVING HIS PLEAS VACATED

The district court failed to advise Vonn during either of the plea colloquies that, if he went to trial, he had the right to counsel at that trial. The government concedes that the failure to so advise Vonn violates Rule 11 of the Federal Rules of Criminal Procedure. The issues presented by this case involve how the appellate court is to determine whether a defendant whose guilty plea violates Rule 11 is entitled to relief. Vonn will show that absent an indication from the plea colloquies that he knew of his right to counsel despite the district court's failure to advise him, the pleas must be vacated. The government's contentions that plain error applies, that Vonn must show he would not have pleaded absent the error, and that a reviewing court may look at matters outside the record of the plea colloquy are belied by the history and provisions of Rule 11 and this Court's jurisprudence regarding guilty pleas.

A. Rule 52(b)'s Plain Error Provision is Inapplicable to Rule 11 Violations

To determine the applicability of plain error review to a deficient plea it is necessary to consider both the prerequisites for a constitutional guilty plea and the history and development of Rule 11.

1. The Prerequisites for a Constitutional Guilty Plea

A guilty plea is "a grave and solemn act to be accepted only with care and discernment." *Brady v. United States*, 397 U.S. at 748. Such a plea is constitutionally valid only to the extent it is both "voluntary" and "intelligent." *Bousley v. United States*, 523 U.S. 614, 618 (1998); *North Carolina v. Alford*, 400 U.S. at 30 (stating standard for judging a guilty plea as whether it represents "a voluntary and intelligent choice among the alternative courses of action open to the defendant"). Although this Court has periodically conflated the two prerequisites,[2] it has repeatedly underscored the fact that the question whether a person has acted voluntarily is quite distinct from the question whether he has made a knowing and intelligent choice. *See, e.g., Brady*, 397 U.S. at 749-58; *Parker v. North Carolina*, 397 U.S. 790, 794-98 (1970); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 237-38 n.25 (1973).

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[2] In *Henderson v. Morgan*, 426 U.S. 637, for example, the Court spoke of the intelligence requirement for a guilty plea as an aspect of voluntariness, stating that a plea may be "involuntary" either because the accused does not understand the nature of the constitutional protections he is waiving or he has an incomplete understanding of the nature of the charges. *Id.* at 645 & n.13.

On occasion, the Court has also interchanged "intelligent" and "knowing," describing the "voluntary and intelligent" requirement using slightly different language. *See, e.g., Parke v. Raley*, 506 U.S. 20, 28-29 (1992) (describing standard both as "knowing and voluntary" and as "voluntary and intelligent"); *Boykin v. Alabama*, 395 U.S. at 241-42 (describing standard both as "voluntar[y] and knowing[ ]" and as "intelligent and voluntary").

The voluntariness of a plea turns on the extent to which a defendant is permitted to make a *free choice* among the available alternatives. Thus, a plea is involuntary if it is the product of threats, improper promises, or other forms of wrongful coercion. *See Brady*, 397 U.S. at 748.

The intelligence of a plea, on the other hand, turns on the extent of the defendant's knowledge, he must have sufficient information (and a sufficient understanding of the information) to choose inteliigently between the alternatives. Thus, a plea is unintelligent if the defendant is without the information necessary to assess meaningfully "the advantages and disadvantages of a trial as compared with those attending a plea of guilty." *Brady* at 754; *see also McMann v. Richardson*, 397 U.S. 759, 766 (1970) (stating plea "must be an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences") (citations omitted).

Although the Court has not directly addressed the full scope of the information a defendant must have in order for his plea to be considered intelligent, at a minimum a defendant must be aware of three things: the nature of the offense he is admitting, *Henderson v. Morgan*, 426 U.S. at 645; the constitutional rights he is surrendering by not going to trial, *Boykin*, 395 U.S. at 243; and the direct consequences of his plea (generally, the period of incarceration a conviction subjects him to), *see Alford*, 400 U.S. at 29 n.3; *Brady*, 397 U.S. at 755.

2. Rule 11: Development and Surrounding History

The purpose of Rule 11 is, and has always been, to ensure voluntary and intelligent pleas. *Mitchell v. United*

States, 526 U.S. at 322. Rule 11 began as a relatively brief and simple statement precluding the court from accepting a guilty plea without first determining that the plea was made voluntarily and with an understanding of the nature of the charge. In 1966, the rule was amended to add requirements that the court address the defendant personally in determining the voluntariness of the plea, that the court ensure that the defendant understands the consequences of the plea, and that the court satisfy itself there is a factual basis for the plea; but the rule remained short, with few explicit directives, through 1974.

In 1969, this Court decided two major guilty plea cases: *Boykin v. Alabama*, *supra*, and *McCarthy v. United States*, *supra*. In *Boykin*, the Court held that for a plea to meet the constitutional requirements of voluntariness and intelligence, there must be an affirmative showing of the defendant's knowing waiver of the constitutional rights he is giving up by foregoing a trial: the privilege against self-incrimination, the right to trial by jury, and the right to confront and cross-examine his accusers.[3] 395 U.S. at 243-44. In *McCarthy*, the Court held, pursuant to its

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[3] A defendant gives up other significant constitutional rights when he foregoes a trial and pleads guilty, including the right to counsel and compulsory process at trial and the right to have the government prove his guilt beyond a reasonable doubt. In *Boykin*, the Court did not discuss the role of those rights in the taking of a guilty plea, and the Court has never expressly discussed whether *Boykin*'s enumeration is illustrative or exhaustive. The issue, before and after *Boykin*, is the knowledge necessary to make an intelligent decision about whether to go to trial. Such a decision would take, at a minimum, knowledge of the trial rights expressly set forth in the Fifth and Sixth Amendments. *See Johnson v. Ohio*, 419 U.S. 924 (1974) (Douglas, J., dissenting from denial of certiorari).

supervisory authority over the lower federal courts, that a defendant is entitled to plead anew if the district court accepts his guilty plea "without fully adhering to the procedure provided for in Rule 11." 394 U.S. at 463-64.[4]

In 1975, Rule 11 was substantially amended. In place of the prior general directives about determining the plea was voluntary and made with an understanding of the nature of the charge and the consequences of the plea, the rule added specific provisions regarding the nature of the colloquy the court was to hold with the defendant. Subsection (c) addressed the advice relevant to ensuring the plea was intelligent: it required that the court personally address the defendant and advise him of, and make sure he understood, 1)the nature of the offense and the penalty for it, 2) his right to appointed counsel at all stages of the proceedings, 3) the trial rights surrendered by pleading guilty (jury trial, assistance of counsel at trial, confrontation and cross-examination, and protection against self-incrimination), and 4) that a guilty plea means there will be no trial. Subsection (d) addressed the actions relevant to ensuring the plea was voluntary: it required that the court personally address the defendant and determine that the plea was not induced by force, threat or promises.[5]

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[4] In *McCarthy*, the district court had not addressed the defendant personally regarding his knowledge and understanding of the nature of the charged offense. 394 U.S. at 461 & App. A.

[5] The other provisions added to Rule 11 at the time did not go to assuring the voluntary or intelligent aspects of the plea. Subsection (a) provided for alternative pleas, subsection (b) provided the circumstances under which a plea of nolo contendere could be accepted, subsection (e) addressed plea agreements and the procedure therefor, and subsection (f) required the court to find a factual basis before taking the plea. Subsection (g) was also added, requiring a verbatim record of the plea colloquy proceedings; that subsection, while not directly relevant to assuring voluntary and intelligent pleas, is meant to provide an adequate record for the assessment of whether the plea was voluntary and intelligent. *See* Advisory Committee Notes; *McCarthy*, 394 U.S. at 465.

With a few additions in subsequent years, Rule 11 has remained the same since 1975. The change potentially relevant to this proceeding is the 1985 addition of subsection (h) regarding harmless error and providing that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded."[6]

3. Rule 52(b) is Not Applicable to Rule 11 Errors

a. Error: Per Se, Harmless and Plain

Whenever a court determines error has occurred, it must decide whether to remedy the error.[7] Some errors, by their very nature, so significantly affect the entire

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[6] The changes not relevant to this proceeding include the 1982 provision that the defendant be advised of any special parole term (later broadened to include a supervised release term also), the 1983 provision allowing for conditional pleas, the 1985 provision that the defendant be advised of the possibility of restitution, and the 1999 provision that the defendant be advised of any appeal waiver in a plea agreement.

[7] In some situations, the court must also decide the nature of the remedy. That is not an issue in this case, as the only possible remedy would be to vacate the plea. The government does not argue that a different remedy is appropriate, but rather that the error requires no remedy.

structure of the proceeding that they are remedied without any analysis of how they might have affected, or not affected, the particular proceeding at hand. *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991). Most errors are subject to harmless error analysis, which calls for the error to be remedied unless the government can show that the error did not affect the proceeding. *Chapman v. California*, 386 U.S. 18, 24 (1967); Fed. R. Crim. P. 52(a). But a more stringent review, plain error review, is reserved for most errors not preserved for review by objection in the lower court; plain error review allows for an error to be remedied only if the defendant can show that the error did affect the proceedings. *United States v. Olano*, 507 U.S. 725 (1993); Fed. R. Crim. P. 52(b).

The government contends that plain error review is appropriate in this case because Vonn did not object in the lower court to the inadequate advice given him by the district court before it accepted his guilty pleas. The government relies on Rule 52(b), contending that Rule 11(h)'s harmless error provision is not the exclusive method of review for Rule 11 errors. But the government's argument ignores the history of Rule 11, the Advisory Committee's Notes regarding subsection (h), and the nature of the error in this case. Plain error review has no application to any Rule 11 error, and a Rule 11 error that goes to the essence of whether the plea was voluntary and intelligent is never harmless.

b. The Advisory Committee Did Not Believe that An Unconstitutional Plea Could Be Harmless

Rule 52 has existed in the same form since the Federal Rules of Criminal Procedure were first adopted in

1944. Thus, when the Court in *McCarthy* held that "a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11," 394 U.S. at 463-64, it implicitly rejected the application of Rule 52 to Rule 11 violations.

Fifteen years after *McCarthy*, subsection (h) was added to Rule 11. There is no question that the addition was intended to abrogate *McCarthy*'s per se rule *to some extent*; the issue is to what extent. The history shows two things: first, that the addition of subsection (h) was meant to abrogate *McCarthy*'s per se rule only when the violation did not directly affect the voluntariness or intelligence of the plea, and second, that the plain error review of Rule 52(b) was not meant to apply.

At the time *McCarthy* was decided, Rule 11 was still a short, relatively simple statement, requiring that the court ensure that a plea was voluntary and intelligent. As the rule expanded to encompass several explicit directives to the district court, and particularly with the extensive changes in 1975, the risk of noncompliance became greater. But although the purpose of Rule 11 has always been to ensure voluntary and intelligent pleas, not all the provisions of the amended rule implicated the voluntary or intelligent nature of the plea. Thus, even before the addition of subsection (h), the Advisory Committee had raised concerns about the automatic vacating of a plea due to a Rule 11 violation that did not go to the voluntary or intelligent nature of the plea. In 1982, for example, the Advisory Committee spoke disparagingly of the "remarkable result" of courts vacating pleas for the failure to advise a defendant of the possibility that any false statement given under oath at the plea colloquy could subject

him to perjury charges (Rule 11(c)(5)); the Committee noted that subsection (c)(5) is "qualitatively distinct from the other sections of the Rule. It does not go to whether the plea is knowingly or voluntarily made . . . ."[8]

It is a Rule 11 violation that does not affect the voluntariness or intelligence of the plea that the Committee had in mind when it added (h) in 1985. In discussing the amendment, the Committee noted that *McCarthy*'s rule of automatic vacating of the plea had not been restricted by the circuits to cases on direct appeal but was being used to vacate pleas when a motion to withdraw a plea was made, Rule 32(d),[9] or when a collateral challenge was made on habeas. The Committee was legitimately concerned with how such developments adversely affected the interest in finality, but it found that interest of "lesser weight" when a direct appeal is involved, specifically noting that the standard of *Hill v. United States*, 368 U.S. 424 (1962), would not be applicable to a direct appeal challenge.[10]

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[8] That same year, Rule 11(c)(1) was amended to add that a district court should advise a defendant of any potential special parole term, but the Advisory Committee expressly noted that the "amendment should not be read as meaning that a failure to comply with this particular requirement will inevitably entitle the defendant to relief." The Committee cited *United States v. Timmreck*, 441 U.S. 780 (1979), in which this Court held that a technical violation of Rule 11 not amounting to a constitutional error did not entitle a prisoner to relief on habeas.

[9] In 1985, Rule 32(d) allowed for the withdrawal of a plea of guilty to "correct manifest injustice" at any time; currently, Rule 32(e) allows for a motion to withdraw a plea of guilty only before sentencing.

[10] In *Hill*, the Court held that the nonconstitutional error of failure to ask the defendant if he wished to speak personally before he was sentenced, Rule 32(a), is not, without more, remediable on habeas. 368 U.S. at 428. The Court expressly left open the question of whether such a claim would be cognizable on habeas if the defendant alleged that he had had something particular to say at sentencing. *Id.* at 429.

But the Advisory Committee Notes make it clear that the addition of subsection (h) was not meant to allow courts to find "harmless" Rule 11 violations that affected the voluntary or intelligent nature of the plea. The Committee's examples, based on the caselaw, of what would be deemed harmless, and what would not be, are illustrative. Noting that the class of Rule 11 violations that could be considered harmless on direct appeal would be "fairly limited," the Committee gave as examples the judge's failure to advise about an element of the offense where the plea colloquy shows that the defendant was fully aware of the element, the judge's understating of the maximum confinement time where the defendant actually receives less time than the judge did advise him was possible, and the judge's failure to tell the defendant that false statements made under oath at the colloquy could subject the defendant to perjury charges.

On the other hand, the examples the Committee gave of Rule 11 violations which would still call for vacating the plea went either to the voluntariness of the plea (such as the judge abdicating to the prosecutor the responsibility for giving the defendant Rule 11 warnings, which would create an atmosphere of "subtle coercion") or the intelligence of the plea (such as the judge's failure to advise the defendant of the nature of the charges against him).

Given the history, the context, and the Advisory Committee Notes, it is thus clear that the addition of subsection (h) to Rule 11 was meant merely to prevent the vacating of pleas based on violations that did not go to the voluntariness or intelligence of the plea, that is, violations of provisions other than those in subsection (c) (nature of the charge, confinement time, and constitutional rights being waived) and (d) (force, threats or promises). To achieve that end, the Committee borrowed the language of Rule 52(a). The government suggests that this tells us nothing about the applicability of Rule 52(b) to Rule 11 violations, but it really tells us a great deal.

First, since the Advisory Committee was borrowing the language of Rule 52(a), there can be no question that Rule 52 was not "overlooked." Indeed, the Committee Notes reflect express consideration of 52(a). The government suggests that this does not show consideration of 52(b); but these are all provisions of the same rules, the Federal Rules of Criminal Procedure. As this Court has repeatedly recognized, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Duncan v. Walker*, ___ U.S. ___, 121 S.Ct. 2120, 2124 (2001) (internal quotations omitted).

Second, the very genesis of the addition of subsection (h) to Rule 11 was the application by the circuits of *McCarthy*'s per se approach of vacating the plea for a rule violation. All of the cases discussed by the Advisory Committee were direct appeal cases in which there had been no objection in the district court. *See, e.g., United States v. Coronado*, 554 F.2d 166 (5th Cir. 1977); *United States v. Journet*, 544 F.2d 633 (2d Cir. 1976). Thus, it is clear that the Committee considered challenges on direct appeal when no objection had been made below; indeed, those appear to be the *only* cases the Committee had in mind when subsection (h) was added to Rule 11.[11]

Third, the Committee's concern was *not* whether the violation had been brought to the district court's attention; indeed, the Committee did not raise that concern even as to plea challenges raised on habeas.[12] The Committee's concern was with the vacating of pleas because of some minor or technical violation of Rule 11. And in discussing that concern, the Committee expressed frustration with the automatic vacating of pleas "[n]otwithstanding the declaration in Rule 52(a)." Thus, the very goal of the Committee in adding subsection (h) was to make it clear that Rule 52(a) *was* applicable to a Rule 11 violation. It is inconceivable that the Committee would not have included the language of 52(b) in subsection (h) if it had meant for the failure to object to play a role in appellate review.

c. Plain Error Review is Inappropriate When a Plea is Unconstitutional

The Committee's apparent decision not to penalize the failure to object to Rule 11 violations makes eminent sense. For many reasons, the taking of a guilty plea is a

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[11] There was no objection in the district court in *McCarthy*, and yet the Advisory Committee expressly recognized that the error in that case would require relief even under subsection (h).

[12] The Committee drew a distinction between direct appeal challenges and collateral challenges, but only as to how they differ in terms of the interests in finality.

unique proceeding, and Rule 11 violations which go to the voluntary or intelligent nature of the plea are unique errors. The concerns underlying plain error review are simply not applicable to such proceedings and such errors.

First, Rule 11 places a duty *on the court* to inquire and advise. There is no duty on the defendant to ask to be advised and questioned. In the usual case outside Rule 11, a court's duty is triggered only by a defendant asserting his right; thus, for example, a court has a duty to rule lawfully on the admissibility of evidence but only if the defendant challenges the admissibility. But in the context of Rule 11, where a defendant has no duty and the court has an express duty, it makes no sense to suggest that the defendant has forfeited the error because he has failed to act. *See Barker v. Wingo*, 407 U.S. 514, 527 (1972) (discussing why defendant's failure to assert speedy trial rights does not operate as a waiver and noting: "A defendant has no duty to bring himself to trial; the State has that duty. . . . ") (footnote omitted).

Second, the rule of forfeiting issues by failing to raise them in the trial court developed in the context of counsel being allowed to make most trial decisions. When the government speaks of Vonn forfeiting his right to have the court advise him as required by Rule 11, it is holding Vonn responsible for the inaction of his attorney.[13] But that makes no sense in the context of a voluntary and

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[13] Surely, a defendant cannot be expected to personally object to the court's failure to advise him of rights when he doesn't know that the court has any duty to do so; and certainly he cannot be expected to remind the court of what advice it is supposed to be giving when the very duty of the court to advise supposes a lack of knowledge on the part of the defendant.

intelligent plea or the waiver of the constitutional rights involved in such a plea because those rights are personal to the defendant and cannot be waived or forfeited by counsel. Vonn's lawyer could not have expressly stipulated to the court's bypass of Rule 11. *See Brookhart v. Janis*, 384 U.S. 1 (1966). How does the lawyer's silence operate to forfeit Vonn's right to those protections?

Third, the purposes behind the raise-or-forfeit rule of plain error are simply not relevant to Rule 11 violations. Judicial economy and the prevention of unfair manipulation by the defense are the reasons given for the raise-or-forfeit rule. *See Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977). The government suggests those goals are furthered in the Rule 11 context by requiring defense counsel to object, thereby allowing the district court to correct the error on the spot and preventing the defendant from later using the Rule 11 violation to vacate a plea he has become dissatisfied with. But in the unique context of Rule 11 violations, a defense objection is *not* necessary to achieve those aims.

One of the unique aspects of a Rule 11 colloquy is that *all* parties – the judge, the prosecutor and the defense attorney – operate with exactly the same knowledge. That is very different from the usual situation during pretrial motions or during trial itself, when neither the court nor the prosecutor is privy to the information or the strategies of the defense. During a Rule 11 colloquy, all parties have the same information and all parties have the same interest in making sure that the plea is valid. All the parties know what Rule 11 requires. All the parties know whether the court has fulfilled its obligations under the rule. All parties know whether the defendant has done and said all that is necessary for his plea to be considered

valid under the Constitution and under the rule. Any defense inclination, intentional, negligent or merely inadvertent, to subvert judicial economy or manipulate the system is easily and effectively curtailed by the court making sure that the provisions of the rule are followed.[14]

Finally, although the provisions of Rule 11 are not constitutional, they are prophylactic rules meant to ensure the constitutional requirement that a guilty plea be voluntary and intelligent.[15] And the advice required by subsection (c)(3) in fact concerns the constitutional rights the defendant is giving up by pleading guilty. A waiver of those constitutional rights is necessary for a plea to be considered intelligent. *Boykin*, 395 U.S. at 243. A court cannot presume a waiver of these constitutional rights from a silent record. *Id.* And because the rights are personal to the defendant, the waiver must be express,

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[14] The prosecutor also has the information necessary to ensure that a proper and thorough plea is taken and that the defense is not left with the possibility of frustrating judicial economy or manipulating the system. Rule 11 places the duty on the court to ensure that the plea is properly taken, but the prosecutor's presence and access to full information can be a "safety net" should the court falter. And to the extent that the Solicitor General raises concerns about the government's evidence becoming stale during an appeal in which a plea is vacated, the government itself has the means to prevent that. The prosecutor's presence and full knowledge at the plea colloquy adequately protects any government interest in making sure that pleas are taken correctly in a timely fashion.

[15] Although all the provisions of Rule 11 are not constitutionally required, parts of subsection (c) and (d) are. It is not unusual for a rule of criminal procedure to cover, and sometimes expand upon, constitutional rights of defendants. *See, e.g.*, Rule 43 regarding a defendant's right to be present at all stages of a trial.

knowing, on the record and personally made by the defendant. *Id.*; *McCarthy*, 394 U.S. at 466.

The government's application of the raise-or-forfeit rule to a guilty plea colloquy would result in the waiver of important constitutional rights by silence. That is unacceptable. In *Barker v. Wingo*, the Court discussed why presuming waiver of a fundamental right from inaction is inconsistent with the clear pronouncements on waiver of constitutional rights; and among the very examples the Court gave of the principle was *Boykin*. 407 U.S. at 526.

Although the Court has never expressly addressed the applicability of plain error review to Rule 11 violations, especially those which go directly to ensuring the plea is voluntary and intelligent, it has seemed to assume that an objection is *not* necessary. As noted, Rule 52(b) was in place at the time of *McCarthy*; and yet it was not mentioned in that opinion despite the lack of a contemporaneous objection to the Rule 11 violation. In *Boykin*, the Court expressly rejected the argument that it could not review challenges to the voluntariness or intelligence of pleas where no objection had been made below, 395 U.S. at 241-42; and, as in *McCarthy*, the Court did not mention Rule 52(b). In *United States v. Timmreck*, 441 U.S. at 784, there had been no objection in the district court to the judge's failure to advise about special parole; while holding that this "technical violation" of Rule 11 was not cognizable on collateral review, the Court expressly noted that Timmreck could have raised his challenge on direct review. And most recently, in *Bousley*, the Court found that a challenge to a guilty plea was defaulted *not* by the failure to object in the district court (which Bousley had not done), but by the failure to raise his challenge on direct appeal; indeed, the Court expressly noted that

Bousely's challenge – being a claim that his plea was unintelligent because the information provided him by the district court at his plea colloquy was inaccurate – was the very "type of claim [that] can be fully and completely addressed on direct review based on the record created at the plea colloquy." 523 U.S. at 622.

In *United States v. Olano*, 507 U.S. 725 (1993), the Court recognized that Rule 52(b) would be applicable to unobjected-to error "unless some other provision authorizes the error's correction." *Id.* at 732. Rule 11(h) and this Court's jurisprudence authorize the correction of a Rule 11 violation affecting the voluntary or intelligent nature of the plea.

B. Vonn is Not Required to Establish That Absent the Rule 11 Violation He Would Not Have Pleaded

1. A Defendant is Prejudiced under Rule 11 if The Plea is Unconstitutional

If plain error applies to an unobjected-to Rule 11 violation, the defendant bears the burden to establish prejudice. If harmless error applies, the government bears the burden to establish the lack of prejudice. As in many proceedings, the allocation of the burden will likely determine which side prevails. *See Speiser v. Randall*, 357 U.S. 513, 525-26 (1958). But first it is necessary to understand the nature of the prejudice caused by a Rule 11 violation.

Under both the harmless error provision of Rule 11(h) and the plain error provision of Rule 52(b), the error must have affected "substantial rights" in order to entitle the defendant to relief. The government asserts that this means that the error must have affected the "outcome" or

the "result" of the proceeding, but that assertion glides over the definition of the "outcome" or "result" of a proceeding in which a criminal defendant pleads guilty.

The government's premise is that the outcome or result of a Rule 11 proceeding is the defendant's guilty plea. Thus, under the government's analysis, the error has affected the outcome only if the defendant would not have pleaded guilty absent the error. But the government has missed a step in the analysis, the constitutional step. The outcome of a Rule 11 proceeding is, or at least is supposed to be, a constitutional plea, that is, a voluntary and intelligent plea. Thus, any Rule 11 (or other) violation that adversely affects the voluntariness or intelligence of the plea is, by definition, prejudicial. And it simply does not matter whether the defendant would have pleaded guilty even if the violation had not occurred.

When a district court fails to fulfill its duty under Rule 11, error has occurred. But all Rule 11 violations are not the same: some have the potential for rising to the level of constitutional errors because they affect the voluntariness or intelligence of the plea. Other Rule 11 violations do not have that potential; they are merely violations subject both to any procedural requirements placed in the rule and to any reasonable, non-constitutional prejudice analysis the Court adopts. If a court fails, for example, to tell the defendant that his answers under oath to any question could be used against him in a later perjury prosecution, that would be merely a Rule violation with no potential for affecting the voluntariness or intelligence of the plea. The Advisory Committee would be free to subject that error to plain error review if the defendant did not object (although it has not done that),

and a reviewing court would be free to adopt a test of prejudice that allowed for relief only if the defendant would not have pleaded had he been properly advised of a later perjury prosecution.

But some of the provisions of Rule 11 go directly to ensuring that the plea is voluntary and intelligent. The court's duty to advise the defendant of the nature of the charges (Rule 11(c)(1)), the custodial consequences of a conviction (Rule 11(c)(1)), and the constitutional rights he is waiving by foregoing a trial (Rule 11(c)(3) and (4)) is aimed at ensuring that the plea is intelligent; and the court's duty to inquire into any force, threats or promises (Rule 11(d)) is aimed at ensuring that the plea is voluntary. Thus, the court's failure to fulfill those particular Rule 11 duties has the potential of causing an involuntary or unintelligent plea, that is, an unconstitutional plea.

Whether the court's failure to fulfill its duties under Rule 11(c)(1), (c)(3), (c)(4) or (d) rises to the level of a constitutional violation will depend on whether, at the time of the plea, the defendant actually had the requisite knowledge or was actually making a free choice. The record must affirmatively show that the plea was voluntary and intelligent. *Boykin*, 395 U.S. at 242-43. If the court has advised and inquired as required by Rule 11, the record will, of course, affirmatively show that the plea was voluntary and intelligent. If the court has failed to advise or inquire as required by Rule 11, a reviewing court will have to look to see if there is otherwise an affirmative showing that the plea was voluntary and intelligent.[16] But absent an affirmative showing that the

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[16] What a reviewing court may look at to make that determination is the subject of Part C, *infra*.

plea is voluntary and intelligent, the plea is considered involuntary and unintelligent and is, therefore, unconstitutional.

2. An Unconstitutional Plea Can Never Be Harmless Error

No harmless error analysis could or does apply to an unconstitutional plea, and this Court has never attempted to apply one. The Court's discussion in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), shows why.

The error in *Sullivan* was a constitutionally deficient reasonable doubt instruction; the issue was whether such an error could be harmless. A unanimous court held that it could not. The Court engaged in two separate analyses to support its holding: a *Chapman* analysis and a *Fulminante* analysis. Under *Chapman*, a reviewing court considers what effect the constitutional error had on the actual verdict. "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan*, 508 U.S. at 279. The Court noted that where the error is an improper reasonable doubt instruction, the entire premise of *Chapman* review "is simply absent."

> There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is *no object*, so to speak, upon which harmless error scrutiny can operate. The most an appellate court can conclude is that a jury *would*

> *surely have found* petitioner guilty beyond a reasonable doubt – not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough.

Sullivan, 508 U.S. at 280 (emphasis in original).

That analysis is equally applicable to the situation in which a plea is constitutionally deficient because it was either unintelligent or involuntary. In such instances, there being no intelligent and voluntary plea, the question whether the same intelligent and voluntary plea would have been rendered absent the constitutional error is meaningless.[17]

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[17] An intelligent plea requires the defendant to have sufficient information, and a sufficient understanding of that information, to choose intelligently between the alternatives. A plea is, therefore, unintelligent if the defendant is without the information necessary to assess "the advantages and disadvantages of a trial as compared with those attending a plea of guilty." *Brady*, 397 U.S. at 754.

Here, Vonn was not told of his right to counsel at trial. Giving up a trial at which he might have to defend himself is significantly different than giving up a trial at which counsel would defend him. Thus, Vonn did not have the information necessary to intelligently assess the advantages and disadvantages of a trial as compared with those attending a guilty plea; he did not have the information about what a "trial" was and what rights he would have at one. His plea was, therefore, unintelligent. The fact that he might have made the same choice even if he had had the knowledge does not retroactively make the choice he made intelligent at the time it was made; his actual choice was unintelligent, although the hypothetical intelligent choice might have been identical.

The most the appellate court would ever be able to conclude is that the defendant would surely have entered a voluntary and intelligent plea had he been properly advised.[18] But that is not enough. If a defendant's guilty plea is not voluntary and intelligent, "it has been obtained in violation of due process and is therefore void." *McCarthy*, 394 U.S. at 466.

The *Fulminante* analysis also leads to the conclusion that harmless error analysis does not apply. In *Fulminante*, the Court distinguished between "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," 499 U.S. at 309, and trial errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented." *Id.* at 307-08. In *Sullivan*, the Court held that the denial of the right to a jury verdict beyond a reasonable doubt was "certainly" a structural error, involving

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[18] That is the standard the government is asking this Court to adopt. The government would allow an appellate court to determine the defendant would have pleaded guilty absent any error if, for example, his sentence was sufficiently lenient or if he had no viable defense to the charges. That approach entirely supplants the requirement of a voluntary and intelligent plea. The Court noted in *Sullivan* that "[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." 508 U.S. at 280. In the same way, the Constitution requires more than appellate speculation about a hypothetical plea, or entering judgment on no plea at all would be sustainable on appeal as long as the appellate court could speculate that the defendant would have surely pleaded guilty had he been given the chance.

the type of right "whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." 508 U.S. at 281.

A constitutionally deficient guilty plea is also a structural error. A plea of guilty is more than an admission of conduct; it is a conviction. *Boykin*, 395 U.S. at 242. The requirement that a plea be voluntary and intelligent is also a right "whose precise effects are unmeasurable, but without which a criminal [proceeding] cannot reliably serve its function." *Sullivan*, 508 U.S. at 281. The function of a criminal proceeding is to determine that the defendant actually did commit a crime. That determination can be made only upon a jury finding beyond a reasonable doubt or upon a voluntary and intelligent guilty plea. Without one or the other, the proceeding has not reliably served its function. And it does not matter that a jury would surely have found the defendant guilty beyond a reasonable doubt or that the defendant would surely have entered a voluntary and intelligent plea.

3. This Court Has Never Applied Harmless Error Analysis to an Unconstitutional Plea

This Court has never applied any type of harmless error analysis to an involuntary or unintelligent guilty plea either on direct appeal or on collateral review. *McCarthy* and *Boykin* are direct appeal challenges to guilty pleas where no objection was raised in the trial court. The Court expressly refused to attach any significance to the lack of an objection in *Boykin* and never discussed any significance to it in *McCarthy*; and in neither case did the Court apply any type of harmless error approach.

In *United States v. Timmreck*, the Court held that a technical violation of Rule 11 was not cognizable on collateral review,[19] but found it unnecessary to consider whether habeas relief would be available if there were "other aggravating circumstances" and noted that Timmreck had not alleged *either* that his plea was unintelligent or that he would not have pleaded guilty had the Rule 11 violation not occurred. 441 U.S. at 784-85. *Henderson v. Morgan* expressly allows collateral relief for an involuntary or unintelligent plea[20] and specifically rejects even the relevance, let alone the determinativeness, of the issue whether the defendant would have pleaded guilty absent the violation that affected the intelligence of his plea. 426 U.S. at 643-44 & n.12.[21]

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[19] The violation in *Timmreck* was the district court's failure to advise the defendant of a special parole term. Citing *McCarthy*, the Court noted that Timmreck could have raised that violation on direct appeal but did not.

[20] *Morgan* came out of state court and thus is not a Rule 11 case. Nevertheless, the violation was the trial court's failure to advise the defendant of a critical element of the charge; the duty to advise of the nature of the charge is required in federal court by Rule 11(c)(1).

[21] The government seems both to attempt to distinguish *Morgan* and to argue that it supports the notion that an unconstitutional plea can be harmless. *See* Pet. Br. at n.17. As the government notes, *Morgan* dealt with a constitutionally defective plea. All pleas taken without complete adherence to Rule 11 will not be constitutionally defective, but those taken without the advice required by Rule 11(c)(1), (2), (3) and (4) or the inquiry required by Rule 11(d) potentially result in involuntary or unintelligent (and therefore unconstitutional) pleas; in those latter cases, the situation is virtually identical to that presented in *Morgan*.

The government relies strongly on *Hill v. Lockhart*, 474 U.S. 52 (1985), to support its contention that the nature of prejudice should be whether the defendant would have pleaded guilty absent the error infecting his plea. Pet. Br. 33. But *Hill* actually shows the fallacy of the government's argument when the flaw in the plea is a voluntariness or intelligence issue.

The Court in *Morgan* left no room for a harmless unconstitutional plea. Indeed, the Court expressly rejected the relevance of the "assumed" fact that Morgan would have pleaded even if he had received correct information. 426 U.S. at 643-44 & n.12. Contrary to the government's assertion, the Court did not suggest that the error in failing to accurately advise Morgan of the intent element of murder could be harmless if he had no intent defense. Although the Court noted Morgan's unusually low mental capacity, suggested that it explained counsel's failure to fully explain the intent element of murder to his client, and noted it foreclosed the conclusion that the error was harmless beyond a reasonable doubt, it did so only in answering the state's dire predictions of numerous collateral challenges to pleas. The Court had already held that it was irrelevant whether the defendant would have pleaded guilty even if he had been properly advised; it makes no sense that the Court would find that factor irrelevant and yet suggest that the error might be harmless if the defendant did not actually have a defense. And the concurring opinion of four justices made clear that, regardless of the strength of the evidence on intent, or the lack of a defense on the issue, or the sound judgment of a lawyer that a conviction would be inevitable, a plea without the defendant's personal understanding of the intent element "cannot be 'harmless error.' " 426 U.S. at 650.

In any event, even if an unconstitutional plea could be subject to harmless error review on collateral review, it cannot be on direct review.

Hill did *not* raise a direct challenge to his plea; and even on collateral attack, his challenge was expressly not to the voluntariness or intelligence of his plea. 474 U.S. at 56. Hill's complaint was that he did not know when he pled that he would be required to serve half of his sentence before he became eligible for parole. *Id.* at 53. It was precisely because such a lack of knowledge did not affect the voluntariness or intelligence of his plea that Hill's only challenge could be ineffective assistance of counsel; thus, he argued that his attorney had failed to advise him about the minimum time he would have to serve before parole. This Court noted that *Strickland v. Washington*, 466 U.S. 668 (1984), requires a showing both of an attorney failing and of the prejudice of a reasonable probability that absent the attorney's failing the result of the proceeding would have been different. It found that Hill had not made any allegation that he would not have pleaded guilty had counsel properly advised him and so was not entitled to relief. *Id.* at 56-58.

Thus, the analysis in *Hill* is a *Strickland* analysis and not a voluntariness or intelligence analysis. And the opinion in *Hill* makes express mention of the differences. For example, the Court noted that the government is not responsible for and not able to prevent attorney errors in advising clients, *id.* at 57-58; but the district court and the government are responsible for constitutionally valid pleas, and the court and the government are able to prevent involuntary and unintelligent pleas by following the procedures of Rule 11. Moreover, the Court in *Hill* linked the interest in finality to the requirement that petitioners challenging pleas based on faulty advice of counsel establish prejudice. *Id.* at 58. That interest is noticeably weaker when the challenge to a plea is raised

on direct appeal, and it weighs significantly less heavily when balanced against an involuntary or unintelligent plea.[22]

The government draws no distinction between direct review and collateral review, and no distinction between either of those and an ineffective assistance of counsel claim. But there are different interests involved in each type of challenge, and there is no justification for adapting the analysis of one to the others.

4. The Government's Approach Would Insulate Virtually All Pleas from any Appellate Review

It is important to understand that the adoption of the approach proffered by the government would result in no relief for a Rule 11 violation in virtually any case. The government's premise for why an objection is so critical is that the district court will correct the Rule 11 failing if it is brought to its attention; if that premise is sound, the only Rule 11 violations appellate courts would see would be those without objections in the district court. If the burden is on the defendant to establish that he would not have pleaded absent the unobjected-to Rule 11 violation, no defendant could obtain relief on appeal. Since, by

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[22] A *Strickland* analysis always requires a stronger showing of prejudice than a direct challenge. For example, if a defendant shows that the court failed to advise him of his right to appeal as required by Rule 32(a), the only prejudice he must show is that he did not otherwise know of his right to appeal. *Peguero v. United States*, 526 U.S. 23, 28 (1999). But if a defendant raises an ineffective assistance of counsel claim for his attorney's failure to advise him about his right to appeal, he must show that he would have appealed if counsel had properly advised him. *Roe v. Flores*, 528 U.S. 470 (2000).

definition, the issue would not have come up in the district court (or else it would be a Rule 11 violation that *was* objected to), the appellate record would shed absolutely no light on whether the defendant would have pleaded absent the violation; and no defendant would be able to meet his burden on appeal.[23]

No defendant would be able to obtain relief on collateral review either. Most Rule 11 violations are not cognizable on collateral review. *Timmreck*, 441 U.S. 780. Although a constitutional violation rendering the plea involuntary or unintelligent is cognizable on collateral review, the claim is defaulted if not raised on direct review. *Bousley*, 523 U.S. at 615. But even if the defendant could establish cause and obtain relief from his default, how would he prove that he would not have pleaded guilty absent the Rule 11 violation? As the Court recognized in *Morgan*, a defendant's testimony that he would not have pleaded guilty is entirely hypothetical and quite problematic. 426 U.S. at 644 n.12; *see also McCarthy*, 394 U.S. at 469 (rejecting government's suggestion that Rule 11 violation should be subject to harmless error and

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[23] Under the government's approach, the defendant would have to prove not just that he would not have pleaded guilty, but also that the reason he would not have pleaded guilty was directly related to the Rule 11 violation. Thus, Vonn's motion to withdraw his plea in the district court, a clear indication that he had not genuinely meant to plead guilty, would not satisfy his burden because it was based on his misunderstanding of the nature of the charge and not on his ignorance of his right to counsel at trial. But one would never expect there to be a motion to withdraw a plea based on inadequate advice in violation of Rule 11, because a defendant does not know he has the rights or that the advice was supposed to be given, and thus does not realize that those grounds exist for such a motion.

noting that a defendant will usually have to rely only on his "plaintive allegations that he did not understand" and will rarely prevail).

The government's argument leaves Rule 11 meaningless. It leaves rights without remedies. It leaves duties without any means either to enforce them or to remedy the failure to fulfill them.

C. Appellate Review is Restricted to the Plea Colloquy

If direct appeal review of the validity of a guilty plea challenged on the basis of a Rule 11 violation that directly affects the voluntariness or intelligence of the plea is limited to whether the plea was indeed voluntary and intelligent (and does not include whether the defendant would have pleaded guilty absent the error), the scope of review becomes an issue. What may the reviewing court consider in determining whether the plea was voluntary and intelligent despite the Rule 11 violation?[24]

The government contends that an assessment of the prejudice flowing from any error requires a review of the "entire record," and that this is the proper scope of

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[24] If the Court finds that the nature of prejudice for a Rule 11 violation that directly affects the voluntariness or intelligence of the plea is whether the defendant would have still pleaded absent the error, the scope of review would necessarily be almost limitless. The issue would come up only on collateral review, because an appellate record will never shed light on that type of inquiry. And since the reviewing court would not be deciding whether the defendant rendered a knowing and intelligent plea but rather whether he would have rendered a knowing and intelligent plea if given the chance, there would be no reason to limit the scope of the review to the plea colloquy or to any particular event or set of events.

review for a Rule 11 violation. Pet. Br. 39-45. That contention, however, misunderstands the nature of the error.

The scope of review in assessing prejudice is necessarily determined by the nature of the error. Prejudice flowing from errors that occur during a trial is usually assessed in the context of the trial. For example, the prejudice from prosecutorial misconduct, as the government points out, is assessed in the context of the entire trial, including the evidence introduced and the arguments made by both parties. *See United States v. Yong*, 470 U.S. 1 (1985). That makes sense because the prejudice of such errors is the impact the error has on the jury; and whatever impact that was, it was part of the entire trial the jury heard and saw.

But, as the government also notes, some errors are different; they are not part of a trial or the prejudice is not the way they may have affected the jury. Often, the assessment of prejudice from such errors is indeed limited to a particular proceeding. When a defendant's right to be present at all critical stages of a trial is violated, for example, prejudice is assessed not by looking at the trial as a whole and weighing the defendant's absence against the outcome of the trial, but rather by looking solely at the proceeding at which he was absent. *See Lewis v. United States*, 146 U.S. 370 (1912).

To be constitutionally valid, a guilty plea must be voluntary and intelligent *at the time it is made*. That is, indeed, the very purpose of both the Rule 11 and the *Boykin* colloquies: to ensure that the plea is voluntary and intelligent at that time. *McCarthy*, 394 U.S. at 465 (Rule 11 "is intended to produce a complete record *at the time the plea is entered*"); *Boykin*, 395 U.S. at 244 (when the judge discharges his duties, "he leaves a record adequate for

any review that may be later sought . . . and forestalls the spin-off of collateral proceedings that seek to probe murky memories"). Both Rule 11 and *Boykin* are prophylactic rules meant to ensure voluntary and intelligent pleas; and like all prophylactic rules, one of their main purposes and goals is to avoid later factual disputes about what a defendant actually knew or did not know at the time. *See, e.g., Minnick v. Mississippi*, 498 U.S. 146, 151-53 (1990) (discussing the advantage of *Miranda* in providing "clear and unequivocal guidelines" as to the duties of law enforcement and thus "conserv[ing] judicial resources which would otherwise be expended in making difficult determinations" based on individual characteristics of suspects).[25] The Court discussed this very concern at some length in *McCarthy*:

> Rule 11 is designed to eliminate any need to resort to a later fact-finding 'in this highly subjective area.' . . . The Rule 'contemplates that disputes as to the understanding of the defendant and the voluntariness of action are to be eliminated at the outset.' . . . 'When the ascertainment is subsequently made, greater uncertainty is bound to exist since in the resolution of disputed contentions problems of credibility and of reliability of memory cannot be avoided.' . . . There is no adequate substitute for demonstrating in the record *at the time the plea is entered* the defendant's understanding. . . .

394 U.S. at 469-70 (emphasis added).

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[25] *Miranda* provides an apt analogy to Rule 11. *Miranda* sets forth clear and unequivocal rules regarding advisements that a suspect must be given before custodial questioning can take place. When those advisements are not given, courts are not allowed to look to see if the suspect knew his constitutional rights despite the lack of advisement.

Once the Court accepts that proceedings other than the guilty plea colloquy may be considered in assessing the state of the defendant's knowledge at the time he entered his plea, the determination becomes necessarily complicated. The government suggests that the reviewing court should look at the initial appearance, the post-indictment arraignment, written plea agreements, any statements made by either the defendant *or* his lawyer, even a defendant's failure to "show surprise" when finally given the information to see if the defendant actually knew of the omitted information. Pet. Br. 42-43. The government cannot cite to any other context in which this Court has found a waiver of constitutional rights to be knowing based on statements made by third parties or a defendant's failure to show surprise.

And, of course, no logic would restrict the inquiry to just those incidents mentioned by the government. If the inquiry is whether the defendant was ever told of his rights, any advisement would seem relevant. If the defendant has been to law school, would what he learned in criminal procedure class qualify? If the defendant pleaded guilty ten years earlier in an unrelated case, would what he was told then qualify? If defendant had discussed his upcoming plea with a jailhouse lawyer, would that prisoner's statements about defendant's constitutional rights qualify? If the defendant had been present sometime when another defendant pleaded guilty, would what the court told that defendant qualify? Indeed, the Seventh Circuit has recently suggested that what a defendant has seen on television may qualify to show that he was really aware of his constitutional rights

when he pleaded. *United States v. Driver*, 242 F.3d 767 (7th Cir. 2001).[26]

But there are problems even if the inquiry is restricted to other judicial proceedings in the case before the court. The government encourages the Court to look at Vonn's initial appearance and post-indictment arraignment. It is true that at both those proceedings a judge advised of certain constitutional rights,[27] but that was in the context of collectively advising many defendants about many rights, most of them having nothing to do with constitutional rights at trial. Indeed, much of the

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[26] The government suggests that restricting to the plea colloquy the inquiry into what the defendant actually knew when he pleaded would lead to "absurd results" because a defendant could plead in the middle of trial and if the plea colloquy failed to show he was told of his trial rights he had already been exercising, the plea would be considered unintelligent. Pet. Br. 43-44. That may be, but certainly the result in such a rare situation is not any more absurd than determining that the defendant really was aware of his rights because he did not show surprise when finally told or because he watched *Perry Mason* on television when he was a child. No matter what rule the Court adopts, one can conjure up "absurd results" that will occur from time to time. But we are discussing the waiver of critical constitutional rights and the taking of pleas that result in prison terms; certainly, we should adopt the rule most likely to ensure that pleas are voluntary and intelligent at the time they are given and not one allowing us to second guess the defendant's state of mind or knowledge later on – second guessing which will inevitably lead to mistakes in finding that a defendant had knowledge when he really did not.

[27] As to the constitutional right of representation by counsel at trial, the advisement at the initial appearance was less than clear. The magistrate advised that defendants had the right to representation by retained counsel at every stage of the proceedings, but he did not make that express advisement regarding appointed counsel.

judges' statements at those proceedings had to do with bail and detention, an issue probably of vastly greater concern to the defendants at those stages of proceedings than constitutional rights at trial. It is unreasonable to assume that the advisements as they related to constitutional rights at trial had any particular meaning to any particular defendant at that point.[28]

More important, a defendant's knowledge that a right exists in the abstract is *not* the knowledge necessary to make his plea intelligent. An intelligent plea is an *informed* choice between the available options. To make an informed choice to plead guilty and forego trial, a defendant must understand not just that he has the right but that the plea of guilty means he is waiving that right. Nothing in any of the group advisements made at initial appearances or post-indictment arraignments even hints at waiver of constitutional rights, and there can be no reasonable assumption that a defendant told months earlier in an entirely unrelated context of some rights would connect those to a waiver of trial when he pleads guilty.

Although this Court has never expressly addressed the scope of review when evaluating a guilty plea challenge based on a claim that the plea was not intelligent, the Court has seemed to assume that the intelligence of a plea is dependent on what is said at the plea colloquy. In *Bousley*, for example, the Court held that Bousley had defaulted his intelligence challenge to his plea by not

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[28] Although the written advisements to which Vonn put his "X" were more personal to him, they were not made by the court. And this Court has discussed the problems inherent in attempting to determine the nature and scope of a defendant's understanding by form advisements and written waivers. *See Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948).

raising it on direct appeal. The Court expressly noted: "This type of claim can be fully and completely addressed on direct review based on the record created at the plea colloquy." 523 U.S. at 622. And the Court has consistently rejected voluntariness or intelligence challenges to pleas based on the defendant's information *after* he pled, holding that the relevant inquiry is his knowledge and state of mind *at the time of the plea*. *See, e.g., Brady*, 397 U.S. at 757; *McMann v. Richardson*, 397 U.S. 759, 767-68 (1970).

The very purpose of Rule 11 in general and subsection (g) in particular is to prevent the type of searching factual inquiry that the government is proposing.[29] The court is required to advise the defendant on the record and by personally addressing him so that there can be no doubt that the plea is intelligent. And a record of the colloquy is required so that a reviewing court can assess whether the plea was intelligent. There is no need to go

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[29] The government contends that restricting review to the plea colloquy is inconsistent with "the plain intent of Rule 11(h)." Pet. Br. 42. But nothing about adapting harmless error to Rule 11 errors instructs what the scope of review is to be. Indeed, the Advisory committee Notes from 1983, when (h) was added to Rule 11, suggest strongly that the intent was to restrict appellate review to the plea colloquy. The Committee expressly listed *McCarthy* as an example of a Rule 11 violation which would be prejudicial even under subsection (h), and in *McCarthy*, the Court had decidedly rejected the government's argument that it should look to events other than the plea colloquy to determine the extent of the defendant's knowledge at the time his plea was given. 394 U.S. at 648-70; *see also United States v. Coronado*, 554 F.2d at 173-74, (cited by the Advisory Committee, expressly rejecting the notion that reviewing court may "look beyond the four corners of the Rule 11 proceeding" to determine the defendant's knowledge).

outside the record of the plea colloquy, and doing so only invites extended hearings, wastes judicial resources and risks sanctioning unintelligent pleas.

D. Vonn's Guilty Pleas Must be Vacated

If the Court finds that no objection is necessary to preserve a Rule 11 issue (or a voluntariness or intelligence issue) for direct appellate review, then there is no relevance to the fact that neither Vonn nor his attorney made an objection at the time of the plea colloquy. But even if the Court finds that an objection is necessary to avoid plain error review, plain error would still be inapplicable to this case. An objection *was* made in the district court, albeit by the prosecutor.

The government dismisses the prosecutor's objection as irrelevant, noting that it was not exacting in pointing out the district court's failing (referencing only the failure to advise on "right to counsel" and not "right to counsel at trial") and thus left the defense with an obligation to make the exacting objection. Pet. Br. 17 n.5. But the fact remains that the Rule 11 error was brought to the court's attention. That is not only relevant, it is in fact determinative.

The court has a duty under Rule 11. The duty is clearly set forth in the Rule, and the district court is charged with knowledge of its duty. Even were an objection necessary, an objection setting forth in general terms the court's failure is sufficient. In determining the sufficiency of objections, this Court has "applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore

sufficient to preserve the claim for review." *Douglas v. Alabama*, 380 U.S. 415, 422 (1965).[30] Given the general principle and the fact that the court's duty is clearly set forth in Rule 11, the prosecutor's objection satisfied the purpose of any requirement for an objection. And inasmuch as the purpose of an objection is to give the court an opportunity to take corrective action, it cannot possibly make a difference who objects. The district court's failing was brought to its attention, and the district court chose not to take any corrective action. The Rule 11 violation is amply preserved for review even if an objection is a prerequisite.

If the issue is preserved for appeal, either because no objection was necessary or because the prosecutor's objection suffices, it is the government's burden to establish lack of prejudice. If an objection was necessary and the prosecutor's objection is not sufficient (and the error is subject to any type of harmless error analysis), it is Vonn's burden to establish prejudice. Under Vonn's analysis, the nature of prejudice is only whether he had actual knowledge of that which the court failed to advise him; under the government's analysis, the nature of prejudice

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[30] In *Douglas*, the Court held that defense counsel's objection to a document being read by the prosecutor during cross-examination of a witness was sufficient to preserve a confrontation challenge for review, although no specific confrontation challenge was noted and state procedure was not adhered to entirely. *See also Osborne v. Ohio*, 495 U.S. 103, 122-24 (1990) (defense motion to dismiss case prior to trial on grounds that statute was overbroad and covered constitutionally protected photographs and not just lewd photographs was sufficient to preserve issue of failure of jury instructions to specify lewdness requirement).

is whether Vonn would have pleaded guilty even had he known. Either way, Vonn is entitled to relief.

Alphonso Vonn was 21 years old when he was arrested for the bank robbery which led to the charges in this case. He had never been arrested before; he had never been in custody before; he had never been through the criminal justice system before. There is no reason to expect that he had ever even heard of, let alone fully comprehended, most of his constitutional rights.

He was charged with serious crimes that carried an absolute minimum of five years in prison, a usual term of about ten years in prison, and a potential of thiry years in prison. He was held in custody before trial, thereby facing the stress of being away from his family and community in addition to the stress of a likely lengthy prison term.

He had a viable defense, at least to the charge of using a firearm in the course of a violent felony. He maintained consistently, including in open court, that he did not personally have or use a gun and that he was unaware of the guns his accomplices had until they pulled out the weapons inside the bank.

He tried to understand the proceedings and his predicament. He asked questions. He noted to the court that, although his lawyer came to see him often, he was having trouble understanding what he was being told: "I'm not quite understanding what [counsel's] trying to – what's the information given to me, because I don't know nothing about the system. So I don't really know – understand what he is saying." He asked for a new lawyer expressly because he was not understanding what was happening; he was told he could have one only if he could afford to hire one.

The district court did not fulfill its responsibilities under Rule 11. That is error. The error in this case is not a technical violation of Rule 11 but rather concerns the constitutional rights Vonn was giving up by pleading guilty. Thus, the error went directly to the intelligence of his pleas. Nothing else said or done during either of his plea colloquies advised him of his right to counsel at trial.

Even if we look to the other proceedings the government suggests should be considered in evaluating the scope of Vonn's knowledge, we still are left with substantial doubt as to whether he understood that he had the right to counsel at trial and knew that he was giving up that right by pleading guilty. At his initial appearance on the original complaint, he was told only that *retained* counsel would represent him at every stage, never that appointed counsel would represent him at trial. The post-indictment arraignment on the original indictment was manifestly inadequate: the very purpose of the proceeding was to arraign Vonn so he could enter his plea, but no plea was ever even requested of him. Vonn was never properly arraigned on the superseding indictment, and he was not advised of any rights after the filing of that indictment. Although he put his "X" on a written advisement of rights, he did that with counsel – and the record is clear that he was having trouble understanding counsel.

There is no way to know for certain whether Vonn would have pleaded guilty if he had been properly advised. Certainly, there was no particular advantage to pleading guilty: the government made no concessions, no agreements to even recommend a particular sentence and no offer to dismiss any charge. Vonn exhibited conflicted feelings about pleading guilty from the beginning, first

saying he would not, then saying he would, then attempting to withdraw his plea. He consistently maintained his innocence on the most serious charge, the gun use. Under such circumstances, any small thing might have changed his mind, particularly advice concerning his right to counsel, since he expressed concern about understanding the attorney he had.

There is nothing to suggest that Vonn was either attempting to thwart judicial economy or trying to manipulate the system in any way. He moved to withdraw his plea promptly, before he even knew what his sentence was going to be. He had expressly disputed the factual basis for his plea to the gun use at the plea colloquy, and he was no doubt confused by the legalese explanation of conspiracies and Pinkerton liability. He had lawful grounds to withdraw the plea and should have been allowed to do so. Although the grounds he proffered to withdraw his plea did not include the specific Rule 11 violation, he had no way of knowing either that there had been a violation of Rule 11 or that such a violation would be grounds to withdraw his plea.

Given all these circumstances, Vonn has satisfied any burden he bears. The Court of Appeals was correct in vacating his pleas.

CONCLUSION

For all these reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

RELEVANT RULE PROVISIONS

Federal Rule of Criminal Procedure 11; Pleas

(a) **Alternatives**

. . .

(b) **Nolo contendere**

. . .

(c) **Advice to Defendant**. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a

jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.

(d) **Insuring That the Plea is Voluntary**. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) **Plea Agreement Procedure**

. . .

(f) **Determining Accuracy of Plea**

. . .

(g) **Record of Proceedings**. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) **Harmless Error**. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

Federal Rule of Criminal Procedure 52; Harmless Error and Plain Error

(a) **Harmless Error**. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) **Plain Error**. Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

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No. 00-973

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ALPHONSO VONN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

v.

ALPHONSO VONN

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REPLY BRIEF FOR THE UNITED STATES

1. This Case Does Not Involve An Unconstitutional Guilty Plea

Respondent suggests that, because the district court did not advise him at the plea proceeding of his right to the assistance of counsel at trial, his guilty plea was unintelligent and therefore taken in violation of the Constitution.[1] That contention goes beyond the Rule 11

[1] Respondent's brief is inconsistent on whether there was constitutional error in the district court's acceptance of his guilty plea. In one footnote, respondent directly argues that his plea was unintelligent. See Br. 30 n.17. Elsewhere, however, respondent argues more tentatively that the kind of Rule 11 error that occurred in this case "affect[s]" the constitutionality of the plea (Br. 19), "ha[s] the potential for rising to the level of constitutional error[]" (Br. 27), and "potentially result[s] in involuntary or

issues that were resolved in the court of appeals and on which certiorari was granted. The court of appeals did not hold that respondent's guilty plea was not intelligently made and was therefore constitutionally invalid. Rather, the court of appeals' decision rested squarely on the district court's Rule 11 error. See Pet. App. 3a, 4a-5a. As a consequence, the only questions properly presented in this case concern the standard and scope of appellate review of Rule 11 error when that specific claim of error has not been made in the district court.

Respondent's argument that his plea was constitutionally invalid because the court did not specifically advise him at his plea proceeding of his right to counsel at trial also fails on the merits. This Court has never held that the Constitution requires that a criminal defendant be specifically advised *by the court* of the constitutional rights that he waives by pleading guilty, much less that he be so informed at the time he enters his guilty plea. Such a decision would amount to ruling that the procedures of Rule 11 are compelled by the Constitution, a holding that this Court has rejected.[2]

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unintelligent (and therefore unconstitutional) pleas" (Br. 33 n.21). In the court of appeals, respondent presented this case as a challenge to the Rule 11 colloquy and maintained only in passing that there was constitutional error in the plea. See Resp. C.A. Br. 14.

[2] See *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969) (noting that "the procedure embodied in Rule 11 has not been held to be constitutionally mandated"); *Halliday* v. *United States*, 394 U.S. 831, 832-833 (1969) (sustaining, against collateral challenge, a guilty plea accepted in violation of Rule 11 before *McCarthy*, in light of district court's finding that Halliday had entered his plea "voluntarily and with an understanding of the nature of the charges against him," and also noting that a "large number of constitutionally valid convictions * * * may have been obtained without full compliance with Rule 11"). In *Halliday*, the defendant

In *Boykin* v. *Alabama*, 395 U.S. 238 (1969), the Court established a rule that a guilty plea may not be accepted "without an affirmative showing that [the plea] was intelligent and voluntary," *id.* at 242, and in particular that the defendant had waived three specific, "important federal rights"—the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers, *id.* at 243.[3] The Court did not suggest, however, that specific advice to the defendant from the court about the rights waived by the plea, at the time the plea is entered, is necessary for such a showing. Moreover, the Court has stated that a guilty plea may be constitutionally invalid if the defendant was not informed by the court *or counsel* about certain fundamental matters, such as the nature of the charges.[4] Thus, this Court's decisions do not support

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sought to withdraw his plea on the ground that the district court never explained the nature of the charge against him or informed him of the maximum possible sentence. See *Halliday* v. *United States*, 262 F. Supp. 325, 328 (D. Mass.), vacated, 380 F.2d 270 (1st Cir. 1967). The district court found that, although the court that took his plea did not question Halliday about his understanding of the charges against him, nonetheless the plea was constitutionally valid because Halliday's counsel had explained the charges to him, and Halliday understood the nature of those charges. See *Halliday* v. *United States*, 274 F. Supp. 737, 737-739 (D. Mass. 1967), aff'd, 394 F.2d 149 (1st Cir. 1968), aff'd, 394 U.S. 831 (1969).

[3] As respondent observes (Br. 13 n.3), the Court in *Boykin* did not identify the right at issue in this case, the right to the assistance of counsel at trial, as one of the constitutional rights for which an "affirmative showing" of a valid waiver must appear on the record.

[4] See *Henderson* v. *Morgan*, 426 U.S. 637, 642 (1976) (noting that Morgan's lawyers "did not explain the required element of intent" to him); *id.* at 646 (similarly noting that Morgan's lawyers "did not explain to him that his plea would be an admission" that he acted with the requisite intent for second-degree murder); *id.* at

the proposition that a guilty plea obtained without the full advice of constitutional rights from the court required by Rule 11 is necessarily unintelligent or constitutionally deficient.

In any event, respondent *was* advised before entering his guilty plea that he had the constitutional right to the assistance of counsel at trial. At the post-indictment arraignment, the court specifically informed respondent that he was entitled to be represented by counsel at all stages of the proceedings, and that the court would appoint counsel to represent him if he could not afford retained counsel. J.A. 22. On the same date, respondent signed a statement acknowledging his constitutional rights, including the right "to be represented by counsel at all stages of the proceedings" and to have appointed counsel if he could not afford to retain an attorney. J.A. 26. Respondent confirmed in open court that he had heard and understood the court's statements "[p]ertaining to [his] rights and the appointment of counsel," and that he had seen and signed the statement of those rights. J.A. 25. His attorney also confirmed in writing that respondent understood his rights. J.A. 29. The record thus establishes not only compliance with *Boykin*, but also that respondent was informed of his constitutional right to counsel at trial, and thus that respondent intelligently waived that right when he pleaded guilty.

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647 (observing that "[n]ormally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused").

2. Rule 11(c)(3) Errors Are Subject To Plain-Error Review If Raised For The First Time On Appeal

Respondent argues (Br. 16) that the plain-error principles of Rule 52(b) are inapplicable to any Rule 11 error, and also that the harmless-error principles of Rule 11(h) and Rule 52(a) are inapplicable to any Rule 11 error that "goes to the essence of whether the plea was voluntary and intelligent." Respondent thus argues (Br. 28) for a rule of automatic reversal for Rule 11 errors that have "the *potential* of causing an involuntary or unintelligent plea" (emphasis added); *id.* at 33 n.21. Those contentions are incorrect.[5]

a. *The text and background of Rule 11.* There is no basis in the text of Rule 11(h) to suggest that some subset of Rule 11 errors may not be found harmless. Rule 11(h) states that "*[a]ny* variance from the procedures required by this rule which does not affect substantial rights shall be disregarded" (emphasis added). The requirement that the court inform the defendant of his right to the assistance of counsel at trial is one of the "procedures required by this rule," specifically in Rule 11(c)(3), and is thus subject to harmless-error review.

Respondent's argument that harmless-error principles never apply to deviations from Rule 11(c)(3) is also inconsistent with the Advisory Committee's Note accompanying Rule 11(h). As respondent observes (Br. 19), that Note gave, as an example of the kind of Rule 11 error that could be deemed harmless, the court's

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[5] These are different questions from the question whether acceptance of a truly involuntary or unintelligent guilty plea can be harmless error, which is not presented in this case. As we have explained, respondent's guilty plea was made with knowledge of his constitutional right to counsel at trial, and so his guilty plea was intelligently made. See p. 4, *supra*.

failure to inform the defendant of an essential element of the offense (which is required by Rule 11(c)(1)). See Fed. R. Crim. P. 11(h) advisory committee's note (1983) (discussing *United States* v. *Coronado*, 554 F.2d 166 (5th Cir.), cert. denied, 434 U.S. 870 (1977)). But that kind of error is surely one that, in respondent's formulation, might "affect" the intelligence of a guilty plea (see Br. 18-19). It has long been held that a constitutionally valid guilty plea requires that the defendant have notice of the nature of the charge against him. See *Bousley* v. *United States*, 523 U.S. 614, 618-619 (1998); *Henderson* v. *Morgan*, 426 U.S. 637, 645-647 (1976).[6] Thus, the Advisory Committee's Note refutes respondent's argument that the Committee intended to exempt from harmless-error analysis deviations from procedures of Rule 11 designed to ensure that a guilty plea is entered voluntarily and intelligently.[7]

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[6] *Coronado* involved the district court's failure to explain adequately to the defendant the nature of a conspiracy charge. See 554 F.2d at 172. The court of appeals in that case plainly understood the error as bearing on the core purpose of Rule 11, to ensure voluntary and intelligent guilty pleas. See *id.* at 172 n.8 (relying on *Henderson* v. *Morgan*, in which the defendant pleaded guilty without having been informed by either the court or counsel of an essential element of the offense of second-degree murder).

[7] As respondent notes (Br. 17-18), Rule 11(c)(5) was amended in 1982 to require the court to advise the defendant that his answers to questions under oath could form the basis of a perjury prosecution *only* if the court actually intended to question the defendant under oath about the offense. At that time, the Advisory Committee observed that Rule 11's requirement of warning the defendant about a potential perjury prosecution was "qualitatively distinct" from other requirements of the Rule, and expressed concern about vacatur of guilty pleas based on deviations from marginal requirements of Rule 11. See Fed. R. Crim. P. 11(c)(5) advisory committee's note (1982). Contrary to respondent's reading, however, the 1982 Advisory Committee's Note did not distinguish between those aspects of Rule 11 that were designed to ensure a constitutionally voluntary and intelligent plea and those that were not so designed. Rather, the Advisory Committee, quoting *United States* v. *Sinagub*, 468 F. Supp. 353 (W.D. Wis. 1979), distinguished between Rule 11(c)(5) and those requirements of Rule 11 that "go to whether the plea is knowingly or voluntarily made, *[or] to whether the plea should be accepted and judgment entered*"— including such nonconstitutional mandates as Rule 11(f), requiring that the court determine that the plea has a factual basis. See Fed. R. Crim. P. 11(c)(5) advisory committee's note (1982) (quoting *Sinagub*, 468 F. Supp. at 358 (emphasis added)).

Respondent also observes (Br. 20-21) that the cases cited by the Advisory Committee in support of the adoption of Rule 11(h) were cases in which no objection to the district court's deviation from Rule 11 had been made in the lower court. Thus, respondent hazards, the Advisory Committee must have assumed that the harmless-error principle of Rule 11(h), rather than the plain-error standard of review, would apply in such cases. No such inference can be drawn from the Advisory Committee's Note, however. Before Rule 11(h) was adopted, this Court had held in *McCarthy* v. *United States*, 394 U.S. 459, 471 (1969), that "prejudice inheres in a failure to comply with Rule 11," whether or not the district court's noncompliance with the Rule might have affected the plea. In most cases, the record on its face would have demonstrated whether the district court had complied with Rule 11. A reviewing court could therefore have readily determined whether the defendant was "prejudiced" under *McCarthy*, with-

out regard to whether the objection was raised below.[8] But once the Federal Rules rejected the automatic-reversal rule of *McCarthy* and required an effect on "substantial rights" to warrant reversal (Fed. R. Crim. P. 11(h))—that is, an effect on the outcome of the proceeding (see U.S. Br. 29-35)—the distinction between harmless error and plain error, and consequently the importance of raising a claim of error in district court, became significant.

There is no merit to respondent's argument (Br. 20) that, because Rule 11(h) borrowed the harmless-error language of Rule 52(a) but not the plain-error language of Rule 52(b), the Court should draw the negative inference that Rule 11(h) was intended to preclude reliance on plain-error principles. As we have shown (U.S. Br. 22-23), the text of Rule 11(h) establishes only that the automatic-reversal rule under *McCarthy* had been repudiated, and that a reviewing court *must* disregard Rule 11 errors (like other errors) that *do not* affect substantial rights. Rule 11(h) does not, however, address how a reviewing court should treat errors that might have been prejudicial but were not brought to the attention of the lower court. Accordingly, the usual background principles of procedural default come into effect. Significantly, the limiting principles of plain-error review that normally apply to forfeited claims do not derive exclusively from the text of Rule 52(b), but

[8] That point also explains why, as respondent observes (Br. 25), this Court noted in *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979), that the defendant could have raised his claim of Rule 11 error on direct appeal, even though he had not raised it in the district court. Since the Rule 11 error in that case would have appeared on the face of the record and would have automatically required reversal on appeal, the defendant's failure to raise it in district court was not significant.

also stem from long-established judge-made rules confining relief for forfeited claims. See U.S. Br. 22-23 n.9; *United States* v. *Olano*, 507 U.S. 725, 735-737 (1993). Accordingly, once the automatic-reversal rule of *McCarthy* was abandoned, the general principles of plain-error review became applicable, even without inserting a carbon copy of Rule 52(b) into Rule 11.

b. *The objectives of Rule 11.* Respondent further argues (Br. 21-22) that the purposes of Rule 11 counsel against plain-error review of Rule 11 errors. First, he argues that, because the court has an independent duty to advise the defendant of the constitutional rights that he waives by pleading guilty, it should not be necessary for a counseled defendant to preserve a claim that the court has not complied with the Rule. This Court has not suggested, however, that, merely because the court has an independent obligation to comply with procedural rules, a defendant is relieved of the responsibility to make a contemporaneous objection when the court fails to comply.

Respondent notes (Br. 22) that, in *Barker* v. *Wingo*, 407 U.S. 514, 523-528 (1972), the Court rejected an absolute "demand-waiver" rule, under which a defendant would have been flatly barred from raising a claim under the Speedy Trial Clause unless and until his counsel had asserted a demand for a speedy trial. This case, however, does not involve any issue of *waiver*; rather, the question is whether a more restrictive standard of appellate review should be applied when the claim of Rule 11 error is raised for the first time in the court of appeals. See *Olano*, 507 U.S. at 733-734 (distinguishing waived claims from forfeited claims that may be reviewed for plain error). Moreover, the Court in *Barker* stated that "a defendant has some responsibility to assert a speedy trial claim" in the trial court,

407 U.S. at 529, and the courts of appeals have applied plain-error review to claims under the Speedy Trial Clause and the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, that were not first presented to the district court.[9] They have done so, moreover, even though, as with Rule 11, the district court has an obligation to ensure compliance with the deadlines of the Speedy Trial Act. See, *e.g.*, 18 U.S.C. 3161(c)(1) ("the trial * * * *shall commence* within seventy days from the filing date * * * of the information or indictment") (emphasis added).

Second, respondent argues (Br. 22-23) that the constitutional requirement that a guilty plea be voluntary and intelligent reflects a right that is personal to the defendant and cannot be waived or forfeited by counsel. But, as explained above (p. 4, *supra*), there is no basis in this case for a conclusion that respondent's guilty plea was involuntary or unintelligent. Rather, the question is whether respondent's counsel should have brought to the attention of the district court the fact that it had omitted part of the advice required by Rule 11. The purpose of the advice is to ensure that a guilty plea be voluntary and intelligent (and that a record of the defendant's knowledge accompanying his waiver be made). The absence of that advice, however, does not by itself mean that the plea is *constitutionally* invalid; as respondent acknowledges (Br. 28), the deviation from Rule 11 creates only the "potential" for a constitutional violation. And, as respondent points out

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[9] See *United States* v. *Hayes*, 40 F.3d 362, 366 (11th Cir. 1994) (constitutional claim), cert. denied, 516 U.S. 812 (1995); *United States* v. *Asubonteng*, 895 F.2d 424, 428 (7th Cir.) (same), cert. denied, 494 U.S. 1089 (1990); *United States* v. *Baker*, 40 F.3d 154, 158-159 (7th Cir. 1994) (statutory claim), cert. denied, 514 U.S. 1028 (1995).

(Br. 23), given the clarity of Rule 11's command and its central role in thousands of federal criminal prosecutions every year, "[a]ll the parties"—including, no doubt, respondent's trial counsel—"know what Rule 11 requires." Respondent's trial counsel thus had an obligation to ensure that his client's guilty plea was entered after a colloquy that conformed to the requirements of that Rule.

Third, respondent discounts (Br. 23-24) the possibility that defense counsel might seek to manipulate the district court's failure to give all the advice required by Rule 11 for strategic advantage, but that concern is real. Defendants are not infrequently dissatisfied with the sentences they receive, even when they have been advised of the statutory maximum sentence and even when they have been warned in plea agreements and in Rule 11 colloquies that the district court is not bound by a sentencing recommendation agreed to in a plea agreement. See Fed. R. Crim. P. 11(c)(1), 11(e)(1)(B), 11(e)(2). A district court might decide, contrary to the expectations of the defendant and the government, that a different Guidelines sentencing range is applicable, or decide to depart upward from the applicable range. Such a decision might leave the defendant with a sentence that is considerably higher than the one he expected or hoped for, even though he had no legal entitlement to a lower sentence. In such a case, a defendant and his counsel might well conclude that it is in the defendant's best interest to attempt to overturn the plea. Under respondent's submission, the district court's failure to advise a counseled defendant in his plea colloquy that, if he went to trial he would have the right to counsel at that trial, would provide the defendant with a free pass to later overturn his plea, even where (as here) the defendant had previously

been informed that he had the right to counsel at trial. Indeed, reversal would be mandated even if the defendant's counsel was aware of the court's deviation from Rule 11's requirements but had intentionally said nothing in order to retain the option to void the plea. That result is not consistent with sound practice.

3. A District Court's Failure To Comply Fully With Rule 11(c)(3) Is Plain Error Only If It Affected The Outcome Of The Proceedings

Respondent argues (Br. 26-36) that a district court's acceptance of a guilty plea that is not voluntary and intelligent can never be harmless error. This case, however, does not present that question, because respondent's guilty plea is not constitutionally flawed. See p. 4, *supra*. Rather, the question here is whether, when a defendant has entered a voluntary and intelligent guilty plea but the Rule 11 proceeding was defective in some way, a court must vacate the plea even if the defect did not materially affect the outcome of the proceedings. The correct answer is "no."

That conclusion follows from two points. First, contrary to respondent's submission (Br. 30-32), there is no basis to conclude that a Rule 11 error that does not affect the constitutional validity of a guilty plea is "structural error" that cannot be subjected to harmless-error analysis. Rule 11(h) repudiated that premise by providing that Rule 11 error can be harmless and on such occasions should be disregarded. See Fed. R. Crim. P. 11(h) advisory committee's note (1983) ("Subdivision (h) makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11."). And, because Rule 11(h) does not "attempt to define the meaning of 'harmless error,' which is left to the case law" (*ibid.*), the prejudice analysis should be the same as conventional prejudice analysis for other kinds of errors: a material effect on the outcome of the proceeding. See U.S. Br. 31-35.

Second, even when a defendant can show some form of prejudice from a Rule 11 error, a reviewing court should not exercise its discretion to reverse for plain error unless the error "seriously affect[ed] the fairness, integrity or public reputation" of the proceeding. *Olano*, 507 U.S. at 736 (citation omitted). At a minimum, if a plea is voluntary and intelligent, and if there is no reason to believe that the district court's failure to comply fully with Rule 11 materially affected the defendant's decision to enter that plea, the defendant has no claim that his conviction is fundamentally unfair. Public confidence in the justice system would not be promoted by the court of appeals' exercise of its discretion to vacate such a conviction.

Respondent argues (Br. 36-38) that the application of plain-error review to Rule 11 errors not raised in the district court would insulate "[v]irtually [a]ll [p]leas from any [a]ppellate [r]eview," because a defendant would never be able to show on appeal that he would not have pleaded guilty had the district court complied with Rule 11. Defendants do, of course, generally find it more difficult to establish prejudice under plain-error review than under harmless-error principles, and properly so. See *Olano*, 507 U.S. at 734; *id.* at 742 (Kennedy, J., concurring). But in fact, courts of appeals applying plain-error review have vacated guilty pleas because of noncompliance with Rule 11. For example, in *United States* v. *Gandia-Maysonet*, 227 F.3d 1, 4-5 (1st Cir. 2000), the court of appeals concluded that, in light of the district court's failure to give an adequate explanation of an intent element of the defendant's offense, in violation of Rule 11(c)(1), and the fact that

the evidence of that element of intent was not overwhelming, the defendant might not have pleaded guilty had the district court properly explained the nature of the charge to him. Similarly, in *United States* v. *Quinones*, 97 F.3d 473, 474-475 (11th Cir. 1996), the court of appeals concluded that the district court's failure to explicate the nature of a firearms charge violated the defendant's substantial rights and was plain error requiring reversal. While those cases involved error under Rule 11(c)(1) rather than (as in this case) Rule 11(c)(3), there may also be circumstances in which a court might conclude, based on a particular record, that a defendant probably would not have entered a guilty plea if the district court had properly advised him that he was relinquishing a particular right by pleading guilty. There is no reason to doubt that courts of appeals will appropriately exercise their discretion under Rule 52(b) in cases involving Rule 11 errors.

4. The Entire Record Of The Case Should Be Considered In The Prejudice Determination

Respondent argues (Br. 38-45) that, in determining whether a Rule 11 error warrants reversal, the court of appeals should consider only what the defendant said or was told at the Rule 11 hearing, and not any information, no matter how relevant, contained elsewhere in the official record of the case. That contention should be rejected.

For a guilty plea to be constitutionally valid, a defendant must act voluntarily and intelligently at the time that he enters his plea. *Brady* v. *United States*, 397 U.S. 742, 749-758 (1970). It does not follow, however, that only the information that was imparted to the defendant at the guilty plea hearing is relevant to that determination. Although *Boykin* established a requirement of an affirmative showing on "the record" that a guilty plea was voluntary and intelligent (see 395 U.S. at 242), the Court did not suggest that "the record" in such cases is limited to the record of the hearing in which the guilty plea is entered. Moreover, *Bousley* v. *United States*, *supra*, supports the conclusion that the entire record in the case must be considered. There, the Court noted that, when a criminal defendant was provided at an earlier stage of the proceeding with a copy of an indictment that accurately set forth the nature of the charge against the defendant, "[s]uch circumstances, standing alone, [gave] rise to a presumption that the defendant was informed of the nature of the charge against him." 523 U.S. at 618; see also *Henderson* v. *Morgan*, 426 U.S. at 647. Under that analysis, if the record of the case establishes that at an earlier point in the prosecution, the defendant was provided with the information that he should have been provided at his guilty plea hearing, there is at least a presumption that the defendant's plea was voluntary and intelligent.[10]

There is no merit to respondent's speculation (Br. 42-43) that a defendant might not pay sufficient attention

[10] Of course, even if a defendant is properly and adequately informed at an earlier stage in the proceedings of the nature of the charge against him and of his constitutional rights, events after that point might render a plea involuntary or unintelligent—as in *Bousley*, where the defendant was initially provided a copy of the indictment but was subsequently given misinformation about the nature of the charge. 523 U.S. at 618. But that point establishes only that the presumption that the plea is voluntary and intelligent that arises from a showing that the defendant was given proper information may be rebutted; it does not suggest that only information given to the defendant at his guilty plea hearing may satisfy the requirements of *Boykin*.

to advice that he is given about his constitutional rights at trial when he appears for his initial appearance or his arraignment. If, as in this case, a defendant is expressly informed both orally and in writing of his constitutional right to counsel at trial, and if he confirms that he understands that he has that right, at the least a presumption should arise that his subsequent actions are taken with knowledge and understanding of the existence of that right. Unusual cases may arise in which that presumption could be rebutted, but that would surely not be the ordinary case. There is no reason to believe that, as a systematic matter, defendants would fail to attend to a judge's advice about the right to counsel at trial with the appropriate seriousness.

Respondent notes (Br. 39-40) that both *Boykin* and Rule 11 set forth prophylactic rules designed to avoid collateral challenges to the constitutional validity of guilty pleas, and also likens the advice required by Rule 11 to the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The prophylactic rules of *Miranda* and *Boykin*, however, are of a different order than those of Rule 11, because they are themselves constitutionally based. See *Dickerson* v. *United States*, 530 U.S. 428, 439-400 (2000); *Boykin*, 395 U.S. at 242-244. The procedures of Rule 11 are not themselves required by the Constitution, and when the record affirmatively establishes—as it does here—that the defendant was given the information necessary to ensure that his guilty plea is voluntary and intelligent and would not be vacated for constitutional error, there is no basis for a reviewing court to blind itself to that fact when considering the effect of the Rule 11 error on the proceeding.

Respondent objects (Br. 41-42) that such an approach to prejudice is unduly complicated and might lead the

court to explore information that the defendant might have obtained from other sources, such as other legal proceedings and popular culture. The rule of *Boykin*, however, necessarily minimizes that objection, because, under *Boykin*, if "the record" does not affirmatively establish that the defendant was informed of the nature of the charge against him and of certain constitutional rights that are waived by pleading guilty (see 395 U.S. at 243), then the guilty plea is constitutionally invalid. But since the entire record of the case may be consulted to determine whether a guilty plea is constitutionally valid (see pp. 14-15, *supra*), the same information should also be considered in determining whether any Rule 11 error was prejudicial.

Respondent further argues (Br. 43) that only the record of the Rule 11 hearing may be considered because a constitutionally valid guilty plea requires that the record show, not just that the defendant understood that he has certain constitutional trial rights, but also that he understood that his guilty plea means that he is waiving those rights. This Court, however, has never held that, as a constitutional matter, the defendant must be specifically advised by the court that his guilty plea waives all of his constitutional trial rights. Indeed, while Rule 11(c)(4) expressly requires the district court to advise the defendant that, "by pleading guilty * * * the defendant waives the right to a trial,"[11] the Rule does not expressly require the district court to advise the defendant that a guilty plea waives certain rights that he would have at a trial, including the right to

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[11] The district court complied with that aspect of Rule 11 in this case. See J.A. 39-40, 58 (explaining to respondent that, by pleading guilty, he would be "giving up certain rights," including the right to a trial).

counsel and the right to confront and cross-examine witnesses. For constitutional purposes what is significant is that the record establishes that the defendant was aware of the trial rights given up by a guilty plea, not the precise moment at which he was given that information.[12]

5. Under The Proper Standard And Scope of Appellate Review, Respondent's Convictions Should Be Affirmed

Finally, respondent contends (Br. 46-49) that the district court's Rule 11 error requires reversal under any standard or scope of review for prejudice. That contention should be rejected. Respondent was advised more than once, both orally and in writing, that he had the right to counsel, including appointed counsel, at every stage of the proceedings; each time he confirmed his understanding of his rights. See J.A. 15, 18, 22, 25, 26, 28. Nothing in the record suggests, nor has respondent argued, that he had any impediment to understanding that information. Moreover, contrary to respondent's suggestion now that he might not have truly wanted to plead guilty (Br. 48), the record shows that respondent was eager to enter a guilty plea to the armed robbery charge, and that his lawyer persuaded the district court not to accept a plea until he could consult further with respondent. J.A. 31-33. After that further consultation, respondent persisted in his determination to enter a guilty plea to the armed robbery

[12] Respondent also renews his argument (Br. 45-46) that the purposes of the raise-or-forfeit rule were satisfied by the fact that the prosecutor brought to the district court's attention that it had not complied fully with Rule 11(c)(3). On that point we refer the Court to our discussion of the issue in our reply brief in support of our certiorari petition (at 6-8).

charge, even though he was also aware that he would have to face a trial on the firearm charge. J.A. 35-36. Indeed, he entered that plea without obtaining any agreement from the government about dismissal of charges or disposition of his sentence.

Respondent suggests (Br. 47-48) that he might not have adequately understood the nature of the firearm charge, and that he might have been confused about the element of "us[ing]" or "carr[ying]" a firearm under 18 U.S.C. 924(c) (1994 & Supp. V 1999), especially since one of the government's theories was that he could be held responsible under the *Pinkerton* doctrine for his co-conspirators' violations of Section 924(c) (see J.A. 55). But respondent did not argue in the court of appeals that his guilty plea was unintelligent because he had not understood the nature of the firearm charge against him or that the district court had not adequately explained that charge to him. Nor did the court of appeals suggest that respondent's guilty plea was invalid on that basis. While respondent now argues that he had a potential defense to the Section 924(c) charge, he made a calculated decision, after consultation with counsel, not to contest that charge. Respondent may now regret having pleaded guilty, but his pleas were voluntary and intelligent, made after receiving advice about his constitutional rights and with full information about the nature of the charges against him. There is therefore no basis for vacatur of those pleas.

* * * * *

For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 00-973

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ALPHONSO VONN,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant's challenge to his guilty plea based on a violation of Rule 11 is subject to plain-error review under Rule 52(b) if he failed to object to the violation in the district court.

2. Whether the nature of prejudice to be assessed when a guilty plea is taken in violation of Rule 11 is whether the defendant would have pleaded guilty absent the error.

3. Whether, in determining the existence of prejudice when a guilty plea has been taken in violation of Rule 11, the reviewing court is restricted to the transcript of the Rule 11 colloquy or may consider other matters.

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INTERESTS OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than ten thousand members nationwide and twenty-eight thousand affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates. The NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among the NACDL's objectives is promotion of the proper administration of justice.

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1994 & Supp. III 1997) (amended 2000), and the Sixth Amendment of the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of the NAFD's missions is to file amicus curiae briefs to ensure that the position of indigent

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[1] In accordance with Supreme Court Rule 37.6, amici curiae represent that no party other than counsel for amici authored this brief in whole or in part, and no person or entity, other than amici, have made a monetary contribution to the preparation or submission of this brief. The petitioner and respondent have consented to the filing of this brief, and amici have filed the letters of consent with the Clerk of the Court, pursuant to Supreme Court Rule 37.3(a).

defendants in the criminal justice system is adequately represented.

SUMMARY OF ARGUMENT

1. The history of Rule 11, including Rule 11(h), supports the proposition that the guilty plea process is viewed as different from other criminal procedures, given the gravity of the plea and the nature of rights being surrendered. This history has never wavered from the paramount need to ensure, at the time of the plea, that the defendant is acting knowingly and voluntarily. Commensurate with this need has been the policy in favor of the development, at the time of the plea, of a detailed and complete record to demonstrate the reliability of that proceeding. The broad reading of Rule 11(h) urged here by the government, whereby a reviewing court could look outside the record of the plea colloquy to determine whether a failure to comply with Rule 11(c) was "harmless," would mark a departure from this history and the policy it reflects.

2. Coupled with this history, several additional developments support the need for incentives that would drive trial courts to diligently follow the procedures for taking guilty pleas set forth in Rule 11. These developments include the large increase in guilty pleas shadowing the rising number of criminal convictions in the federal system in recent years, the increased collateral importance of those guilty pleas under several federal sentence enhancement laws, and restrictions placed on defendants who wish to contest guilty pleas entered earlier in the context of federal and state sentence enhancements. The Petitioner's position, lacking clear guidance regarding the proper scope of record review of Rule 11 challenges, would serve to overburden appellate courts already struggling under the weight of increased criminal appeals and

would serve to undercut, rather than enhance, the reliability of guilty pleas.

3. Several other judicial administrative interests are served by a narrow construction accorded to Rule 11(h). Judicial economy warrants the imposition of continued incentives upon district courts to "get it right the first time" during the plea colloquy. Permitting *post hoc* examination of extraneous evidence on appeal regarding a defendant's state of mind during the plea colloquy would not provide that incentive and would overburden courts. Moreover, adoption of the broad construction urged by the government would lower the level of protection afforded to defendants who are waiving constitutional rights at the time of their pleas. Finally, a broad construction would not properly respect the need for reliability and integrity of the plea process itself.

ARGUMENT

I. THE EVOLUTION OF RULE 11 AND THE DECISIONS OF THIS COURT EMPHASIZE THE NEED TO ENSURE, AT THE TIME THE GUILTY PLEA IS TENDERED, THAT THE DEFENDANT IS ACTING KNOWINGLY AND VOLUNTARILY.

A. Initial Promulgation of Rule 11 and the 1966 Amendments.

The history of Rule 11 evidences an intent to place special emphasis on the importance of the guilty plea process. This emphasis is necessary to ensure that, at the time the plea is taken, the procedure utilized by the trial court possesses the necessary attributes of solemnity and elicits a knowing voluntariness on the part of the defendant to support the waiver of

rights that pleading guilty entails. In 1946, when the Federal Rules of Criminal Procedure became effective, Rule 11 set forth the general admonition that "the court . . . shall not accept [a guilty] plea without first determining that the plea is made voluntarily with understanding of the nature of the charge." FED. R. CRIM. P. 11, 18 U.S.C. app. 3748 (1964) (amended 1966, 1975, 1979, 1980, 1982, 1983, 1985, 1987, 1988, 1989). Rule 11 was considered at the time to be a "restatement of existing law and practice." *See* FED. R. CRIM. P. 11 advisory committee's note 1 (1944) (citing *Fogus v. United States*, 34 F.2d 97, 98 (4th Cir. 1929)). But the codification solidified the view that a plea of guilty is a solemn event that carries with it significant consequences and therefore requires the implementation of certain procedures *by the court taking the plea*. As this Court had explained years earlier:

> A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. . . . Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.

Kercheval v. United States, 274 U.S. 220, 223-24 (1927). The lower courts followed this direction. *See, e.g., Durant v. United States*, 410 F.2d 689, 691 n.4 (1st Cir. 1969); *Heideman v. United States*, 281 F.2d 805, 808 (8th Cir. 1960).

The initial policy set forth in Rule 11 was refined in the 1966 amendments to solidify the role of the trial court taking the plea. These amendments specified that the district court must address a defendant *personally* and ensure that the defendant understands "the consequences of the plea." FED. R. CRIM. P. 11 advisory committee's notes (1966) (internal quotation omitted). This modification of the rule was consistent with earlier doctrine emphasizing the role of the court taking the plea. Indeed, this Court later observed that by requiring a district judge to personally address the defendant, "not only will the judge be better able to ascertain the plea's voluntariness, but he also will develop a more complete record to support his determination in a subsequent post-conviction attack." *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

Echoing this Court's statement quoted above from *Kercheval*, the commentary accompanying the 1966 amendments included a reminder of the frequency of guilty pleas in our criminal justice system, and the commensurate need to ensure that they were properly obtained. *See id.* Thus, "[t]rial courts have a duty to do more than simply listen to an articulation or a verbalization of a plea of guilty by a defendant; they have a duty to insure that the defendant understands the consequences of his act." *United States ex rel. Crosby v. Brierley*, 404 F.2d 790, 794 (3d Cir. 1968). The rule did not contain at that time, however, specific queries required of district courts to fulfill that duty.

B. *McCarthy v. United States* and *Boykin v. Alabama*.

This Court issued two seminal rulings during the 1968 Term related to the taking of guilty pleas that further etched in stark relief the unique importance of procedures surrounding the taking and acceptance of guilty pleas. Read together, *McCarthy v. United States*, 394 U.S. 459 (1969), a federal case, and *Boykin v. Alabama*, 395 U.S. 238 (1969), a state habeas case, emphasized the need for the trial court to ensure that the record of the plea proceeding demonstrates that the defendant acted knowingly and voluntarily and that a factual basis existed

for the plea. Not only did this requirement serve important reliability and judicial administration interests, but strict compliance with the trial judge's duty served important constitutional interests as well.

In *McCarthy*, this Court examined the proper remedy for a failure by a district court to comply with Rule 11. On direct appeal, McCarthy claimed that the trial judge failed to address him personally during the plea colloquy and accepted his plea without first establishing that there was a sufficient factual basis. *See* 394 U.S. at 462. The Seventh Circuit rejected his claim.

This Court found that the trial judge failed to personally inquire of McCarthy whether he understood the nature of the charges against him, and held that "*any* noncompliance with Rule 11 is reversible error." *Id.* at 464 n.9 (emphasis added). It rejected the government's argument that the district court could simply "assume," based on the fact that the defendant stated his intention to plead guilty and was informed of the consequences of his plea, that the defendant understood the nature of the charges against him. Central to the Court's analysis was its discussion of Rule 11's "two purposes": "[I]t is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary [and] is intended to produce *a complete record at the time the plea is entered* of the factors relevant to this voluntariness determination." *Id.* at 465 (emphasis added and footnotes omitted).[2] The Court noted that the "personal interrogation" amendment adopted in 1966 "quite obviously" furthers those two purposes, which have their "genesis" in the

[2] At least two circuit courts have noted the prophylactic value of such a complete record at the time the plea is entered. *See United States v. Bernal*, 861 F.2d 434, 437-38 (5th Cir. 1988); *Carreon v. United States*, 578 F.2d 176, 180 (7th Cir. 1978).

"nature" of a guilty plea. 394 U.S. at 466. In this important regard, the Court explained as follows:

> To the extent that the district judge . . . exposes the defendant's state of mind on the record through personal interrogation, he not only facilitates his own determination of a guilty plea's voluntariness, but he also facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary.

Id. at 467. Subsequent determination of the defendant's state of mind was *not* acceptable, as it would undercut the reliability of the process:

> As the Court of Appeals for the Sixth Circuit explained . . . : *When the ascertainment is subsequently made, greater uncertainty is bound to exist since in the resolution of disputed contentions problems of credibility and of reliability of memory cannot be avoided* * * *. There is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him.

Id. at 469-70 (first emphasis added and internal quotations and citations omitted).

Shortly after the Court in *McCarthy* took steps to enhance procedural requirements applicable during plea proceedings in federal court, a decision which served both reliability and judicial administration interests, the Court decided *Boykin*, a habeas corpus case which involved a guilty

plea tendered in state court. During the plea colloquy in *Boykin*, the trial court "asked no questions of [the defendant] concerning his plea, and [the defendant] did not address the court." *Boykin*, 395 U.S. at 239. In holding that it was reversible error if "the record" fails to disclose that the defendant knowingly and voluntarily entered his plea, the Court emphasized that "[s]everal federal constitutional rights" are waived when a defendant pleads guilty. *See id.* at 242-43. Consistent with its pronouncements in *McCarthy*, the *Boykin* Court cited the need for reliability in the taking of the plea, and the difficulties in administration of a rule that rested upon *post hoc* attempts to discern a defendant's intent and state of knowledge at the time of the plea. *See id.* at 243-44.

C. The 1975 Amendments to Rule 11.

In the wake of and consistent with this Court's 1969 rulings—which stressed the need for certainty at the time of the plea that the defendant was acting knowingly and voluntarily, highlighted the constitutional values at stake, and set forth the administrative benefits served by a clear record—the 1975 revisions to Rule 11(c) served to further ensure "that the defendant who pleads guilty has made an informed plea." FED. R. CRIM. P. 11 advisory committee's notes (1974). Specifically, the 1966 "advice to defendant" provision was expanded to require a district court to also personally inquire of the defendant about his understanding of several enumerated rights, thereby reaffirming the central role of the trial court in the "solemn act" of pleading guilty. *See id.*; *United States v. Prior*, 107 F.3d 654, 657 (8th Cir. 1997).[3]

[3] Prior to this time, given the text of Rule 11 and case law, the objectives of Rule 11—reliability and ease of administration—may have (continued...)

D. *United States v. Timmreck.*

From 1969 until 1974, virtually every circuit faced with an appeal that was based on a failure of the district court to comply with Rule 11's requirements, whether by way of direct appeal or collateral attack, held that *McCarthy* required the guilty plea to be vacated. *See, e.g., United States v. Richardson*, 483 F.2d 516, 519-20 (8th Cir. 1973); *United States v. Cody*, 438 F.2d 287, 289 (8th Cir. 1971). Many of these decisions acknowledged the importance of conducting a proper plea colloquy and the need for district courts to fully comply with the mandates of Rule 11. *See, e.g., Irizarry v. United States*, 508 F.2d 960, 964 (2d Cir. 1974) (amended 1975).

After 1974, however, when the Court decided *Davis v. United States*, 417 U.S. 333 (1974), several circuits began to view Rule 11 errors differently on collateral review. In the course of holding that a change in the law of a circuit after a defendant's conviction may be asserted in a § 2255 proceeding, *see id.* at 347, the *Davis* Court stated:

> This is not to say, however, that every asserted error of law can be raised on a § 2255 motion. In *Hill* v. *United States*, 368 U.S. 424, 429 (1962), for example, we held that *"collateral relief is not available when all that is shown is a failure to comply with the formal*

[3](...continued)
been apparent. But the procedures implemented by the district courts toward achievement of these ends were not, leading one commentator to observe that the taking of guilty pleas was plagued by "vague standards and broad discretion in the trial courts." Note, *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 60, 181 (1969).

> *requirements" of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error.* We suggested that the appropriate inquiry was whether the claimed error of law was "*a fundamental defect which inherently results in a complete miscarriage of justice,*" and whether "[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Id.*, at 428 (internal quotation marks omitted).

Davis, 417 U.S. at 346 (emphasis added and alterations in original).[4]

Despite the fact that *Davis* involved neither a Rule 11 issue nor the policies underpinning that provision, some circuits interpreted the above-quoted passage as an indication that a different standard of review was to be applied to collateral attacks raising Rule 11 violations. *See, e.g., Del Vecchio v. United States*, 556 F.2d 106, 110-11 (2d Cir. 1977). Others, however, continued to rely on *McCarthy*'s "automatic-reversal rule" in such contexts. *See, e.g., Bunker v. Wise*, 550 F.2d 1155, 1156-57 (9th Cir. 1977).

In 1979, the Supreme Court in *United States v. Timmreck* sought to resolve this conflict by addressing "whether a conviction based on a guilty plea is subject to collateral attack whenever it can be shown that Rule 11 . . . was violated when the plea was accepted." 441 U.S. 780, 781

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[4] *Hill v. United States*, 368 U.S. 424 (1962), concerned a failure by the district court to afford a defendant at sentencing an opportunity to allocute, as required by Rule 32(a). The Court in that case explained that such an error "is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus." *Id.* at 428.

(1979). At the plea hearing in *Timmreck*, the district court failed to describe the mandatory minimum three-year special parole term required by the applicable statute. *See id.* at 782. The defendant took no direct appeal of his conviction or sentence. Two years later, the defendant moved pursuant to § 2255 to vacate his sentence, alleging that the district court had violated Rule 11. *See id.* Without reference to *Davis*, this Court stated that because the case involved a collateral attack, "[t]he reasoning in *Hill* is equally applicable to a formal violation of Rule 11." *Id.* at 783.

In the instant case, the government contends that *Timmreck* "significantly undercut a major justification for the automatic-reversal rule adopted in *McCarthy*," that being the alleviation of administrative burdens placed on habeas courts when called upon to determine challenges to guilty pleas on collateral attack. (*See* Br. for Pet. at 25-26.) But this is not necessarily so, as lower courts have frequently limited *Timmreck* to its unique facts. *See, e.g., United States v. Walsh*, 733 F.2d 31, 32-34 (6th Cir. 1984). *Timmreck* did not involve the situation presented here, regarding the scope of review on direct appeal of the failure to advise the defendant of his constitutional right to counsel. Indeed, the *Timmreck* Court expressly stated that the defendant's claim in that case "could have been raised on direct appeal." *Timmreck*, 441 U.S. at 784. Also, *Timmreck* did not involve a situation where the defendant alleged that he was actually ignorant of facts that should have been explained at the time of the plea in order to ensure in keeping with the Rule's dictates that the plea was knowing and voluntary. Nor did it involve, accordingly, the question of what quantum of evidence was required to support or undermine the defendant's subsequent claim of ignorance at the time of the plea.

E. The Adoption of Rule 11(h).

Rule 11(h), the "harmless error" provision at issue in this case, was added in 1983. It provides that "[a]ny variance from the procedures required by [Rule 11] which does not affect substantial rights shall be disregarded." FED. R. CRIM. P. 11(h). Aware of Rule 52(a), the generic harmless error rule, the advisory committee included the following explanation in support of Rule 11(h):

> Notwithstanding the declaration in Rule 52(a) that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded," there has existed for some years considerable disagreement concerning the applicability of the harmless error doctrine to Rule 11 violations.

FED. R. CRIM. P. 11 advisory committee's notes (1983) (alteration in original). This disagreement, as discussed above, stemmed primarily from "uncertainty as to the continued vitality and reach of *McCarthy*," which never cited nor discussed Rule 52(a).[5] FED. R. CRIM. P. 11 advisory committee's notes (1983).

The commentary accompanying the 1983 amendments makes clear that Rule 11(h) was enacted to "reject[] the extreme sanction of automatic reversal" mandated by *McCarthy*, in light of the enhanced Rule 11 requirements established in 1975:

> Though the *McCarthy* per se rule may have been justified at the time and in the circumstances which obtained when the plea in that case was taken, this is no longer the case. . . . [T]he chances of a *truly* harmless error . . . are much greater under present Rule 11 than under the version before the Court in *McCarthy*. . . . A plea of [guilty] should not be overturned, *even on direct appeal*, when there has been a minor and technical violation of Rule 11 which amounts to harmless error.

FED. R. CRIM. P. 11 advisory committee's notes (1983) (second emphasis added).

The Advisory Committee, however, did not indicate that where, as here, the district court failed to advise the defendant of important rights, the error could be harmless, or that facts outside the colloquy record could be adduced in support of such a determination. Indeed, despite the indication that Rule 11(h) was intended to reduce the impact of *McCarthy*, the provision "may not be applied to nullify or dilute important Rule 11 safeguards." *United States v. Jaramillo-Suarez*, 857 F.2d 1368, 1371 (9th Cir. 1988). Thus, "the kinds of Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited." FED. R. CRIM. P. 11 advisory committee's notes (1983). Several examples of harmless deviation from the Rule were provided, such as where the district court failed to inform the defendant of his rights under Rule 11(c)(5), which "has no bearing" on the validity of the plea itself. *See id.*

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[5] Some courts viewed *McCarthy* as superseding Rule 52(a) in the guilty plea context, while others deemed Rule 52(a) controlling. *See, e.g., United States v. Coronado*, 554 F.2d 166, 173 (5th Cir. 1977); *United States v. Journet*, 544 F.2d 633, 636-37 (2d Cir. 1976).

This guidance was consistent with the context that "a guilty plea is a grave and solemn act to be accepted only with care and discernment." *Brady v. United States*, 397 U.S. 742, 748 (1970). In that regard, the advisory committee noted a particular caution:

> [S]ubdivision (h) should *not* be read as an invitation to trial judges to take a more casual approach to Rule 11 proceedings. It is still true . . . that thoughtful and careful compliance with Rule 11 best serves the cause of fair and efficient administration of criminal justice . . . . Subdivision (h) makes *no change* in the responsibilities of the judge at Rule 11 proceedings, but instead merely rejects the extreme sanction of automatic reversal.

FED. R. CRIM. P. 11 advisory committee's notes (1983) (emphasis in original). These admonitions have been reflected in the case law. *See United States v. Corbett*, 742 F.2d 173, 179 n.14 (5th Cir. 1984) (per curiam) ("Rule 11(h), as applied to core concerns, is designed to forgive inadequate addresses, not entire failures." (internal quotations omitted)); *United States v. Odedo*, 154 F.3d 937, 940 (9th Cir. 1998) ("Subdivision (h) makes *no change* in the responsibilities of the judge at Rule 11 proceedings . . . . Thus we hold that the Rule 11(h) 'harmless error' standard applies to all Rule 11 errors, regardless of whether they were ever raised before the district court." (internal quotation omitted)).

F. This History Does Not Support the Government's Argument That Material Outside the Plea Hearing Record Should Be Reviewed on Direct Appeal.

In its brief, the government contends that the Ninth Circuit, in determining whether the district court's failure to comply with Rule 11 constituted reversible error, improperly limited its review on appeal to the guilty plea record. (*See* Br. for Pet. at 11.) Central to this contention is the government's argument that "[t]here is no reason why a reviewing court should refuse to consider" matters beyond the record of the plea proceeding. (*Id.* at 15.) As demonstrated above, however, this argument is inconsistent with the development of Rule 11 and the decisions of this Court. The version of the rule that became effective in 1946 and the amendments in 1966 and 1975 all were adopted with a view towards emphasizing the need for special procedural safeguards surrounding the guilty plea process.

The government urges this Court to approve a scope of appellate review that would be inconsistent with the principles set forth above. Nothing in *Timmreck* undercuts the constitutional issues that arise in the context of a guilty plea. The decision, which the government cites in support of its contention that the alleviation of administrative burdens placed on habeas courts should no longer be of major concern to this Court, did not involve a direct appeal and does not answer the question of whether the Court should approve of an examination of matters beyond the record of the plea proceeding itself.

Nor does Rule 11(h), which was adopted simply to reject the extreme sanction of *automatic* reversal mandated by *McCarthy*, provide support for a scope of review envisioned by the government. The provision was intended to be applied in a limited category of situations, where non-constitutional

procedural niceties were inadvertently not followed, and does not touch upon the issue of whether looking outside the plea proceeding record furthers the proper administration of justice.

In sum, the government's position is untenable, in light of the long-recognized need for reliability in the plea process, the potential administrative burdens, and the underlying constitutional issues. As one court has noted, "[t]he dictates of Rule 11 and the federal policy of fair and efficient judicial administration require that the reviewing court look solely to the record of the plea proceeding." *United States v. Kamer*, 781 F.2d 1380, 1383 (9th Cir. 1986).

II. HEIGHTENED IMPACT OF GUILTY PLEA CONVICTIONS SUPPORTS A NARROW READING OF RULE 11(h).

The history cited above shows that procedures governing the acceptance of guilty pleas have been an area meriting special attention to ensure reliability in the plea process and ease of review after the plea. In addition, several other factors work to militate against the broad interpretation of Rule 11(h) urged by the government. These factors are (i) the increased reliance upon guilty pleas in an already overburdened criminal justice system; (ii) the heightened impact of guilty pleas due to sentence enhancement laws; and (iii) recent restrictions on a defendant's ability to collaterally attack the validity of his or her guilty plea used in federal and state sentence enhancements. These factors favor the more narrow construction of Rule 11(h) urged by Respondent when, as here, the district court failed to advise Respondent of constitutional rights as required by Rule 11(c)(3).

A. Growth in Conviction Rate and Increased Reliance upon Guilty Pleas.

Now more than ever before, guilty pleas permit our overburdened criminal justice system to function with a semblance of order. Since the adoption of the United States Sentencing Guidelines in 1984, there has been a steady increase in the number of criminal defendants convicted in the federal courts. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1999, at 429 tbl.5.30. Over the last decade, the number of federal convictions has grown from 47,486 in 1990 to 67,036 convictions in 2000. *See infra* pp. A-1 to A-2 tbl.1. This rising tide in criminal convictions is pertinent to the administrative issues related to Rule 11 because most federal convictions are obtained by guilty plea. Since 1984, the guilty plea rate for federal crimes has hovered at or near 90%. *See* SOURCEBOOK *supra*, at 429 tbl.5.30 (showing convictions and dispositions by guilty plea for 1984 through 1999). Since 1994, federal guilty plea rates have exceeded 90%, peaking in 1999 to approximately 95%. *See infra* pp. A-1 to A-2 tbl.1. In 2000, the federal guilty plea rate remained at 95%. *See id.*[6]

The recent trend of a 95% federal guilty plea rate signals that the plea bargaining process continues to be fundamental to the efficient administration of criminal justice in the United States. *See Blackledge v. Allison*, 431 U.S. 63, 71 (1977); *Santobello v. New York*, 404 U.S. 257, 260-61 (1971); *Brady v. United States*, 397 U.S. 742, 752-53 (1970); FED. R.

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[6] The conviction rate is also rising at the state level. For example, in 1988, there were 667,366 state felony convictions. By 1996, the number of state felony convictions skyrocketed to 997,970, representing an increase of approximately 67%. *See infra* p. A-3 tbl.2. Similar to their federal counterparts, approximately 90% of state criminal defendants pleaded guilty rather than going to trial from 1988 to 1996. *See id.*

CRIM. P. 11 advisory committee's notes (1974). Because the overwhelming percentage of federal criminal convictions are obtained by guilty plea, the importance of ensuring that each plea proceeding is conducted in compliance with Rule 11's requirements has become paramount, both to secure the defendant's rights, as observed above, and to avoid overburdening appellate courts with meritless appeals. *See McCarthy v. United States*, 394 U.S. 459, 465 (1969) ("[T]he more meticulously [Rule 11] is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.").

To expand the Rule 11(h) inquiry on appeal beyond the scope of the Rule 11 hearing, (*see* Br. for Pet. at 42), would not encourage the trial court to exercise due care in conducting the Rule 11 hearing in the first instance. Such an approach would, however, overlook the unique function of the plea colloquy and the court's strict duty to assess the defendant's understanding of his core constitutional rights *at the time the plea is taken*. Petitioner has cited no authority from the Rule 11(h) or guilty plea context that supports its broad view, which would authorize litigants to bring *any* arguably pertinent information to the attention of the reviewing court. A broad construction of Rule 11(h), to include sources other than the Rule 11 plea record, would increase the workload for reviewing courts and commensurately decrease the level of reliability concerning what the defendant actually knew at the time of the plea and, foremost, whether the plea was in fact knowing and voluntary.

B. Sentencing Enhancements Involving Prior Convictions.

The concern expressed above becomes more acute when one considers the heightened impact convictions—obtained

overwhelmingly as a result of guilty pleas—have today given the increased incidence of sentence enhancement laws. Under federal law, a convicted defendant who has previously pleaded guilty may face a longer sentence under, for example, the United States Sentencing Guidelines (Guidelines), the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e) (1994 & Supp. IV 1998), or certain other provisions.

The Guidelines provide specific ranges for sentencing and mandate sentence enhancement based, in part, on a defendant's criminal history. *See Koon v. United States*, 518 U.S. 81, 88 (1996); U.S. SENTENCING GUIDELINES MANUAL §§ 1B1.1, 4A1.1 (2000) [hereinafter GUIDELINES MANUAL]. The Guidelines further provide enhanced sentences for a "career offender" and convicted defendants with "criminal livelihoods."[7] Other examples of federal laws imposing adverse consequences upon defendants at sentencing based, in part, on their prior criminal histories include the ACCA, the federal Three Strikes Law, 18 U.S.C. § 3559(c) (1994 & Supp. IV 1998), and section 1010(b) of the Controlled Substances Import and Export Act, 21 U.S.C. § 960(b) (1994 & Supp. IV 1998) (amended 2000).[8]

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[7] "Career offenders" are defined as defendants who have committed a felony involving a crime of violence or a controlled substance offense with two or more prior felonies involving violence or a controlled substance offense. GUIDELINES MANUAL, *supra*, § 4B1.1; *see United States v. LaBonte*, 520 U.S. 751, 754 (1997). Defendants with "criminal livelihoods," defined as individuals who have engaged in a pattern of criminal conduct, also receive enhanced sentences under the Guidelines. GUIDELINES MANUAL, *supra*, § 4B1.3; *see United States v. Burgess*, 180 F.3d 37, 41 (2d Cir. 1999).

[8] *See, e.g., Custis v. United States*, 511 U.S. 485, 490-98 (1994) (describing the ACCA's mandatory 15 year sentence for felon in possession

(continued...)

The Guidelines and statutes described above underscore the added impact of guilty pleas and the commensurate need for reliability in the plea process, as prior convictions (again, mostly procured by guilty plea) may later be used to enhance sentences in the federal courts. Thus, trial courts imposing enhanced sentences must have confidence in the integrity of the guilty plea taken earlier. *See McCarthy*, 394 U.S. 459, 465 (1969). The best method of assuring that a defendant was actually aware of his or her rights at the time of the plea is for the trial court to advise the defendant of those rights during the plea colloquy itself—thereby creating a permanent record of the plea proceeding that can be efficiently used to assess any post-conviction challenge. *Id.*

C. Restrictions on the Ability to Collaterally Challenge Prior Guilty Pleas.

In conjunction with the sentence enhancements discussed above, a defendant's ability to collaterally challenge the validity of a guilty plea, particularly in the context of its subsequent use for sentence enhancement purposes, has been restricted by this Court in the last decade. This development

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[5](...continued)
of a firearm who has three prior convictions for a violent felony or serious drug offense); *United States v. Gatewood*, 230 F.3d 186, 188 (6th Cir. 2000) (en banc) (detailing federal Three Strikes Law as mandating life imprisonment where the defendant has at least two prior felonies involving violence or a serious drug offense); *United States v. De Veal*, 959 F.2d 536, 538 (5th Cir. 1992) (describing § 960(b) enhancement). In addition, most states have habitual offender laws that require sentence enhancements for state criminal defendants with prior convictions, including those convictions obtained by guilty pleas—including those obtained in federal court. Indeed, forty-four states and the District of Columbia have some version of this type of legislation. *See infra* pp. A-4 to A-16 tbl.3.

further emphasizes the importance of requiring district courts to closely adhere to Rule 11 mandates in the first instance and the need for this Court to provide guidance to appellate courts to review Rule 11 errors raised on direct appeal under a narrowly tailored Rule 11(h) harmless error standard limited to the reliable record of the plea colloquy. Since 1992, the Court has handed down five decisions that have greatly restricted the ability of a convicted defendant to raise Rule 11 challenges on collateral attack or otherwise seek to withdraw a guilty plea. These cases are discussed below.

1. *Parke v. Raley.*

In *Parke v. Raley*, this Court reversed the lower court's ruling that unavailability of the plea hearing transcripts at sentencing implied that the defendant was not advised of his rights during the initial plea colloquies. 506 U.S. 20, 30 (1992). The Court instead applied a presumption of regularity to the earlier plea proceedings and ruled that the convictions offered for sentencing purposes were validly obtained. *Id.* ("[[T]]here is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears." (internal quotation omitted)). In so doing, the Court drew a distinction between "the presumption of invalidity" applied in *Boykin* to cases on direct review and "the presumption of regularity that attaches to final judgments" being challenged for the first time on collateral review. *Id.* at 29 (internal quotation omitted).

The *Parke* decision explicitly presumed, following final judgment, that the underlying plea proceeding was properly conducted. *Id.* This presumption reflects the underlying recognition that there must be a high degree of reliability in the initial plea proceeding and a high degree of certainty that the proceeding was conducted properly. In the Rule 11 context,

this recognition must be buttressed with incentives for the district courts to follow the strictures imposed by the rule. The broad interpretation of Rule 11(h) urged by Petitioner would *not* provide such incentives. Indeed, such a broad interpretation would provide incentives for courts to take a more casual approach to the rule, however inadvertently or unintentionally. As noted above, *see supra* Part I.E, this is in direct conflict with the history of the rule.

2. *Custis v. United States.*

Custis v. United States, 511 U.S. 485 (1994), also involved the issue of a sentence enhancement based on prior state convictions obtained by guilty plea. Custis collaterally attacked the validity of his prior guilty plea convictions at his federal sentencing proceeding. *See id.* at 490-91.

This Court held that the validity of previous state convictions could not be revisited during federal sentencing proceedings unless the defendant alleges that he was denied counsel when he entered into his guilty pleas. *Id.* at 495-96. In finding that a defendant may seek to collaterally attack a guilty plea where there was a failure to appoint counsel, the Court noted that under controlling precedent, "there has been a theme that failure to appoint counsel for an indigent defendant [represents] a unique constitutional defect." *Id.* at 496.

In concluding that prior convictions not set aside on direct appeal or collateral review are presumptively valid for the purposes of enhancing a federal sentence under the ACCA, the *Custis* decision relied on a presumption of finality accorded to final judgments. As in *Parke*, the *Custis* Court acknowledged the reoccurring theme that failure to promote the concept of finality of judgment would "undermine confidence in the integrity of [plea hearing] procedures and inevitably delay and

impair the orderly administration of justice." *Id.* at 497 (internal quotation omitted).

3. *United States v. Hyde.*

In *United States v. Hyde*, the defendant sought to withdraw his guilty plea after the district court had accepted the plea but before it accepted the plea agreement, on which it deferred decision until the completion of the pre-sentence report. 520 U.S. 670, 672 (1997). This Court reversed the lower court, holding that, following acceptance of the plea by the district court, defendant must show a "fair and just reason" pursuant to Rule 32(e) for withdrawal. *Id.* at 676. By so holding, the Court reemphasized the need to promote the integrity of the plea hearing process recognized in *Custis*, and the "serious act" of entering a guilty plea. *See id.* at 676-77.

4. *Bousley v. United States.*

Bousley v. United States, involved a habeas claim to vacate sentences following the entry of guilty pleas. 523 U.S. 614, 617 (1998). Challenging the validity of his guilty plea conviction for the first time on collateral review, Bousley claimed that the plea was invalid because he was misinformed by the district court about the elements of the offense. *Id.* at 617-18.

This Court held that Bousley's claim was procedurally defaulted because he failed to raise it on direct appeal and that it could be reviewed on its merits only if Bousley made a showing of "actual innocence." *Id.* at 623. The Court based its holding on the "concern with finality" related to "the limitation on collateral attack . . . [on] guilty pleas" in concluding that a claim based on the alleged uninformed nature of the plea could "be fully and completely addressed on direct review *based on*

the record created at the plea colloquy." *Id.* at 621-22 (emphasis added and internal quotations omitted). In *Bousley*, again, the Court stressed its concern with protecting the integrity of the plea hearing process and limiting the Rule 11(h) inquiry to the plea hearing record. *Id.* at 622.

5. *Daniels v. United States.*

Factually similar to *Custis* and *Bousley*, Daniels, a convicted felon, was sentenced under the ACCA, based, in part, on two prior state guilty plea convictions. *See Daniels v. United States*, 121 S. Ct. 1578, 1580 (2001). Daniels then brought a federal habeas petition challenging his sentence based on the alleged invalidity of his prior convictions. *See* 121 S. Ct. at 1580-81.

Following *Custis*, the Court held that Daniels could not bring a federal habeas claim based on the alleged unconstitutionality of prior state guilty pleas that were used to enhance the federal sentence, except where the predicate state convictions were obtained in violation of the right to counsel. *Id.* at 1583. The *Daniels* Court further held that a defendant had no recourse to challenge his prior convictions where they were no longer open to direct or collateral attack in their own right. *Id.* In *Daniels*, the Court again implicitly recognized the integrity of the plea hearing process, as demonstrated by its focus on the concern for the finality of judgments. The *Daniels* Court also acknowledged the difficulties inherent in expecting federal district courts presiding over sentencing hearings under the ACCA to accurately determine the "voluntariness" of defendants' prior state guilty pleas, particularly where those prior guilty pleas were up to fifteen years old and where the plea

transcripts were missing or otherwise unavailable. *Id.* at 1581-82.[9]

6. Construing Rule 11(h) Narrowly.

The five decisions discussed above have markedly restricted defendants' ability to extricate themselves from the collateral effects of guilty pleas. Taken as a whole, the decisions serve to place great emphasis on ensuring, at the time the plea is entered, that it is knowing and voluntary. Indeed, each of these cases demonstrate this Court's appreciation of the integrity and regularity of the plea hearing process in the first instance. *See, e.g., Custis,* 511 U.S. at 497; *Parke*, 506 U.S. at 30.

This presumption of regularity would be eroded in the Rule 11 context if courts were permitted to reach far beyond the record of the plea colloquy to attempt to reconstruct, through attenuated circumstantial evidence on a cold record, what the defendant understood at the time the plea was entered. To maintain the public's—and this Court's—confidence in the plea hearing process, the Court should continue to provide incentives for district courts to closely adhere to Rule 11's mandates and engage in meaningful plea colloquies that

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[9] Indeed, Respondent's case illustrates the difficulties in expanding the prejudice inquiry beyond the scope of the plea hearing. Petitioner argues that evidence other than the plea record should be taken into consideration when applying the Federal Rule of Criminal Procedure 11(h) standard. However, the very records that it asks the Court to take notice of, Respondent's initial appearance and arraignment proceeding transcripts, were not made available until *after* the Ninth Circuit had issued its initial opinion. (*See* Br. for Pet. at 38 n.18.) Consideration of extraneous evidence not readily available would cause undue delay, different treatment accorded appellants, and works against judicial economy interests.

adequately ensure that defendants' pleas are reliable and constitutional.

III. NARROWLY CONSTRUING THE APPLICATION OF RULE 11(h) SERVES IMPORTANT INTERESTS OF JUDICIAL ADMINISTRATION.

A. A Narrow Rule 11(h) Interpretation Promotes Judicial Economy.

The opinion below reflected a straightforward and reliable procedure for reviewing the harmlessness of Rule 11 errors:

> We have interpreted [Rule 11(h)] to mean that we must inquire whether the defendant was aware of his rights . . . .
>
> In determining what the defendant knew, we are limited to what the record of the plea proceeding contains. The requirements of Rule 11 are so easy to follow that we will not go beyond the plea proceeding in considering whether the defendant was aware of his rights.

United States v. Vonn, 224 F.3d 1152, 1155 (9th Cir. 2000) (internal quotation and citation omitted). Limiting the Rule 11(h) inquiry solely to the plea record provides trial courts with a specific framework in which to conduct the plea colloquy and provides a solid record for appellate courts to use in making efficient post-conviction Rule 11 determinations. Both these goals serve judicial economy interests. *See United States v. Kamer*, 781 F.2d 1380, 1384 (9th Cir. 1986); *United States v. Journet*, 544 F.2d 633, 636 (2d Cir. 1976).

In contrast, Petitioner's request to extend the Rule 11(h) prejudice inquiry to the entire case record—or other extraneous evidence—calls for an overly broad interpretation of Rule 11(h) that would return guilty plea voluntariness determinations on appeal back to an unworkable "totality of the circumstances" test, leading to inconsistent results and possibly further confusion among the circuits. Rule 11 was enacted to avoid the shortcomings of this test and to provide courts with a detailed framework to use in conducting their plea hearings.[10] *See United States v. Michaelson*, 552 F.2d 472, 477 (2d Cir. 1977). In amending Rule 11(c) in 1975, as described above, *see supra* Part I.C, Congress intended to simplify the old Rule 11's general guidelines by enumerating specific advice to be administered by the court to the defendant at the time the plea was taken. *See Journet*, 544 F.2d at 636. In limiting the Rule 11(h) harmless error standard solely to the plea colloquy record, the appellate court is able to efficiently determine the merits of post-conviction Rule 11 challenges. *See, e.g., Kamer*, 781 F.2d at 1383.

Petitioner advocates an approach that would require courts on review to engage in *post hoc* reasoning concerning rights the defendant may or may not have known about at the time of his plea. This dilemma could easily be avoided by simple adherence to Rule 11's dictates by district judges in the first instance. *See Journet*, 544 F.2d at 636 ("[C]ompliance with F.R.Cr.P. Rule 11 should be relatively easy for any careful

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[10] Contrary to Petitioner's view (*see* Br. for Pet. at 43), presence of defendant's counsel at the plea hearing does not dispense with the necessity of the warning required by Rule 11(c)(3). *See, e.g., United States v. Alcaraz-Guerrero*, No. 99-50471, 2000 WL 1459749, at *1 (9th Cir. May 5, 2000) (unpublished per curiam table decision); *United States v. Wurth*, No. 94-5345, 1995 WL 323952, at *3 (4th Cir. May 31, 1995) (unpublished per curiam table decision).

district judge." (internal quotation omitted)). Absent such adherence, appellate courts would find themselves entertaining a large number of appeals regarding the defendant's state of knowledge during the plea colloquy in situations where original transcripts of proceedings other than the plea colloquy may have been lost or are otherwise unavailable. Nothing in the text or history of Rule 11(h) requires a contrary result such as the one sought by Petitioner here. *See United States v. Gastelum*, 16 F.3d 996, 998-99 (9th Cir. 1994) ("The [plea hearing] transcript provides all that is needed and all that is allowed for the resolution of [Rule 11(h) harmless error] claims." (internal quotation omitted)).

B. A Narrow Rule 11(h) Interpretation Ensures Defendants' Constitutional Rights Are Sufficiently Safeguarded.

The straightforward test used below ensures defendants' constitutional rights are sufficiently safeguarded and that the contemporaneous record reveals whether a defendant is truly knowledgeable about the consequences of his or her plea and the important constitutional rights that will be irrevocably waived. This test is also the best way to ensure that the integrity of the plea hearing process is respected and preserved. *See Custis v. United States*, 511 U.S. 485, 496 (1994); *United States v. Journet*, 544 F.2d 633, 636 (2d Cir. 1976) ("[T]he acceptance of the plea cannot be dealt with in a hasty or cavalier fashion. Fundamental constitutional rights are at stake, the loss of which could hardly be classified as insubstantial or harmless."); *United States v. Carter*, 619 F.2d 293, 295 (3rd Cir. 1980) (holding right to counsel at trial is core constitutional right). Yet Petitioner's request to open up the record to examine the defendant's state of mind at points *other than* at the time of the plea would vitiate a prime purpose of the

amended Rule 11; i.e., to establish a standardized procedure to guarantee certain minimum safeguards for ensuring that a defendant's voluntary and knowing waiver of important constitutional rights. *See McCarthy v. United States*, 394 U.S. 459, 464-65 (1969); *Gastelum*, 16 F.3d at 999 (limiting Rule 11(h) prejudice inquiry to plea transcript "ensures that a defendant is fully aware of his rights *when his plea is entered*—that he is aware of them *at the time they are being waived* . . . [and e]arlier or later knowledge is insufficient to provide that assurance") (emphasis in original)).

Further, the Rule 11(h) analysis urged by Petitioner has no limiting principle other than "relevance" in terms of time or quality of evidence that could be considered. To set some outer limits would require a raft of litigation and would likely create inconsistencies between the circuits regarding enforcement of the rule.[11]

C. Narrow Rule 11(h) Interpretation Protects the Integrity of the Guilty Plea Process.

Given the growing acceptance and reliance of state and federal courts on plea agreements between prosecutors and

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[11] Petitioner, for example, does not indicate whether the reviewing court would be limited temporally; i.e., limited to looking at evidence a few days, weeks, or months from the plea hearing or whether the advice can be more dated—extending to defendant's prior experience in the criminal system. Nor has Petitioner detailed at what point the advice received becomes too far removed from the challenged plea as to be irrelevant for purposes of determining the validity of the plea. For instance, if the defendant was advised of his right to counsel previously, should the trial court be limited to only prior pre-trial conferences in the same matter, pre-trial conferences in related matters, the defendant's arraignment, his *Miranda* warnings upon arrest or placement in custody, advisements made in previous criminal cases, or his generalized criminal legal knowledge?

defendants, there is an increased need for a narrow application of Rule 11(h). It is important that there be public trust in the integrity of the plea hearing process, which requires that defendants are adequately informed of their rights at the time of the plea and that their guilty pleas are voluntarily, knowingly, and intelligently made. Equally important is the limitation of the Rule 11(h) standard such that when a trial court judge fails to advise a defendant of a constitutional right as mandated by Rule 11(c)(3), the prejudice inquiry into the harmlessness of the error be based solely on whether there is affirmative evidence of defendant's unequivocal understanding of the omitted constitutional right as reflected by the plea hearing record. Absent such a showing, the failure to so inform defendant cannot be deemed harmless error as it affects defendant's constitutional rights. Any other result would cause an increase in convoluted and inconsistent appellate rulings attempting to reconstruct defendants' mental state, which is not a task well suited to the appellate bench. This result, in turn, would diminish confidence in the plea hearing process.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to affirm the judgment of the United States Court of Appeals for the Ninth Circuit rendered below.

Respectfully submitted,

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APPENDIX

TABLE 1: FEDERAL GUILTY PLEA CONVICTION RATES, 1990-2000[1]

12-Month Period Ending	Total Defendants Convicted	Total Guilty Pleas Taken	Federal Guilty Plea Rate
12/31/1990	47,486	41,099	86.55%

[1] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ-143499, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1990, at 31 tbl.3.1 (1993); U.S. SENTENCING COMM'N ANN. REP. 1991 app. B at 4; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ-148949, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1992, at 37 tbl.3.1 (1996); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ-160089, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1993, at 43 tbl.3.1 (1996); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ-163063, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1994, at 42 tbl.3.2 (1998); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ-164259, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1995, at 42 tbl.3.2 (1998); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ172849, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1996, at 42 tbl.3.2 (1998); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 176328, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1997, at 42 tbl.3.2 (1999); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 180258, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1998, at 54 tbl.4.2 (2000); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 186179, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1999, at 56 tbl.4.2 (2001); ADM. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2000, at 221 tbl.D-4.

12-Month Period Ending	Total Defendants Convicted	Total Guilty Pleas Taken	Federal Guilty Plea Rate
9/30/1991[2]	33,237	28,383	85.40%
12/31/1992	52,348	46,130	88.12%
12/31/1993	53,435	48,022	89.87%
9/30/1994	50,701	45,958	90.65%
9/30/1995	47,556	43,584	91.65%
9/30/1996	53,076	48,694	91.74%
9/30/1997	56,570	52,514	92.83%
9/30/1998	60,958	56,896	93.34%
9/30/1999	66,055	62,404	94.47%
9/30/2000	67,036	63,503	94.73%

[2] The Bureau of Justice Statistics did not produce a *Compendium of Federal Justice Statistics, 1991*. Consequently, figures for fiscal year 1991 come from the United States Sentencing Commission's 1991 annual report. The figure under the heading "Total Defendants Convicted" represents the number of defendants convicted and sentenced under the United States Sentencing Guidelines in fiscal year 1991. The figure under the heading "Total Guilty Pleas Taken" represents the number of the convictions resulting from either a plea of guilty or *nolo contendere*.

TABLE 2: SELECT STATE FELONY GUILTY PLEA CONVICTION RATES, 1988-1996[3]

Year	Defendants Convicted of Felonies	Total Felony Guilty Pleas Taken	State Felony Guilty Plea Rate
1988	667,366	610,218	91.44%
1990	829,344	751,993	90.67%
1992	893,630	820,662	91.83%
1994	872,217	773,384	88.67%
1996	997,970	905,957	90.78%

[3] PATRICK A. LANGAN & JOHN M. DAWSON, U.S. DEP'T OF JUSTICE, NCJ-126923, FELONY SENTENCES IN STATES COURTS, 1988, at 6 tbl.9 (1990); PATRICK A. LANGAN & JOHN M. DAWSON, U.S. DEP'T OF JUSTICE, NCJ-140186, FELONY SENTENCES IN STATES COURTS, 1990, at 8 tbl.9 (1993); PATRICK A. LANGAN & HELEN A. GRAZIADEI, U.S. DEP'T OF JUSTICE, NCJ-151167, FELONY SENTENCES IN STATES COURTS, 1992, at 9 tbl.9 (1995); PATRICK A. LANGAN & JODI M. BROWN, U.S. DEP'T OF JUSTICE, NCJ-163391, FELONY SENTENCES IN STATES COURTS, 1994, at 8 tbl.9 (1997); JODI M. BROWN ET AL., U.S. DEP'T OF JUSTICE, NCJ 173939, FELONY SENTENCES IN STATES COURTS, 1996, at 7 tbl.9 (1999).

TABLE 3: SELECT STATE SENTENCING ENHANCEMENT STATUTES

Jurisdiction	Provision(s)	Enhancement
Alabama	Alabama Criminal Code § 5-9(c)(3), (4) ALA. CODE § 13A-5-9(c)(3), (4) (Supp. 2000)	Life imprisonment for conviction of Class A felony if defendant has at least three prior felony convictions; no possibility of parole if at least one of the prior convictions is for a Class A felony
Alaska	ALASKA STAT. § 12.55.125(*l*) (Michie 2000)	Mandatory prison term from forty to ninety-nine years for Class A or unclassified felonies for defendants with at least two serious felony convictions
Arizona	ARIZ. REV. STAT. §13-604.S (2001)	Life imprisonment for third conviction of serious offense for defendants with at least two prior convictions of serious offenses; no probation for first twenty-five years in most cases

Jurisdiction	Provision(s)	Enhancement
Arkansas	Arkansas Criminal Code § 4-501(c)(1), ARK. CODE ANN. § 5-4-501(c)(1) (Michie repl. vol. 1997) (amended 2001)	Mandatory forty-year minimum sentence for second serious felony involving violence
California	Penal Code of California § 667(e)(2)(A), CAL. PENAL CODE § 667(e)(2)(A) (West 1999)	Mandatory indeterminate sentence of life imprisonment for felony conviction with least two prior felony convictions; the minimum sentence is either three times the sentence the conviction would have otherwise received, twenty-five years, or the sentence as determined by the court under section 1170 of the state penal code

Jurisdiction	Provision(s)	Enhancement
Colorado	Colorado Code of Criminal Procedure § 13-101(1), (1.5), COLO. REV. STAT. § 16-13-101(1), (1.5) (2000)	Life imprisonment for third class 1, class 2, or violent class 3 felony conviction; treble the maximum term for third nonviolent class 3, class 4, or class 5 felony conviction
Connecticut	Penal Code § 40(a), (h), CONN. GEN. STAT. § 53a-40(a), (h) (1999) (amended 2001)	Maximum sentence of forty years for third dangerous felony
Delaware	DEL. CODE ANN. tit. 11, § 4214(b) (Supp. 2000)	Life imprisonment for conviction of third serious felony as enumerated in the statute
District of Columbia	D.C. CODE ANN. § 22-104a(a) (Supp. Sept. 2000)	Life imprisonment for third felony conviction; life imprisonment without parole for third violent felony conviction

Jurisdiction	Provision(s)	Enhancement
Florida	FLA. STAT. ch. 775.084(1)(a) 1., (4)(a)1. (1993) (amended 1995, 1996, 1997, 1998, 1999, 2000)	Life imprisonment for first-degree felony for defendants with at least two prior felony convictions; enhanced sentences for third instance of second and third degree felonies
Georgia	GA. CODE ANN. § 17-10-7(b)(2) (1997)	Life without parole for second serious violent felony
Idaho	IDAHO CODE § 19-2514 (Michie repl. vol. 1997)	Third felony conviction requires a sentence between five years and life
Illinois	Criminal Code of 1961 § 33B-1(a), (e), 720 ILL. COMP. STAT. § 5/33B-1(a), (e) (2000)	Life imprisonment for Class X felonies, criminal sexual assault, or first-degree murder when defendant has at least two convictions of Class X felonies, criminal sexual assault, first-degree murder, or aggravated kidnaping

Jurisdiction	Provision(s)	Enhancement
Indiana	IND. CODE § 35-50-2-8.5 (a) (1998)	Life imprisonment without parole for third serious felony conviction
Kansas	Kansas Criminal Code § 21-4504(a), (b), KAN. STAT. ANN. § 21-4504(a), (b) (1995)	Double the minimum term for the second felony conviction as enumerated by statute; treble the minimum term for the third felony conviction as enumerated by statute; enumerated crimes are crimes against persons, sex offenses, and crimes affecting family relationships or children
Kentucky	Kentucky Penal Code § 532.080(6), KY. REV. STAT. ANN. § 532.080(6) (Banks-Baldwin Supp. 2000)	First degree persistent felony offenders convicted of Class A or B felonies sentenced to maximum of twenty to fifty years or life imprisonment; if convicted of Class C or D felony, sentence is ten to twenty years

Jurisdiction	Provision(s)	Enhancement
Louisiana	LA. REV. STAT. ANN. § 15:529.1.A(1) (b)(ii) (West Supp. 2001)	Life imprisonment without parole when the current felony and at least two prior felony convictions are of a violent nature
Maryland	MD. ANN. CODE art. 27, § 643B(c) (Supp. 2000)	Mandatory minimum of twenty-five years for a third crime of violence
Massachusetts	MASS. GEN. LAWS ch. 279, § 25 (2000)	Habitual criminals twice convicted of crimes carrying sentence of three years or more shall be imprisoned for the maximum term provided by law as a penalty for the felony for which he or she is then to be sentenced
Minnesota	Criminal Code of 1963 § 609.1095 subdivision 2, MINN. STAT. § 609.1095 subdivision 2 (1998)	Provides for upward departure to statutory maximum sentence when defendant has at least two prior violent felony convictions

Jurisdiction	Provision(s)	Enhancement
Mississippi	MISS. CODE ANN. § 99-19-83 (rev. 2000)	Life imprisonment without parole for a third felony if any of the felony convictions was a crime of violence
Missouri	MO. REV. STAT. § 558.019.2 (2000)	Provides minimum prison terms for non-dangerous felony convictions that vary depending on defendant's prior felony convictions
Montana	MONT. CODE ANN. §§ 46-18-501, -502(2) (1999)	Convicted persistent felony offender—at least two prior felonies—can receive sentence between ten and one hundred years, a $50,000 fine, or both
Nebraska	NEB. REV. STAT. § 29-2221(1)(a) (reissue 1995)	Third felony conviction results in sentence from twenty-five to sixty years where current felony and at least one of the prior felonies violates specific statutory provisions

Jurisdiction	Provision(s)	Enhancement
Nevada	NEV. REV. STAT. § 207.010(b)(1) (1999)	Mandatory minimum sentence ranging from twenty-five years to life without parole for fourth felony conviction
New Hampshire	Criminal Code § 651:6.I(c), .II(a), N.H. REV. STAT. ANN. § 651:6.I(c), .II(a) (Supp. 2000)	Mandatory sentence of ten to thirty years for conviction for non-murder felony where defendant has been convicted twice, in any jurisdiction, and the prior sentences carried terms of imprisonment of more than one year
New Jersey	Persistent Offenders Accountability Act § 2(a), N.J. STAT. ANN. § 2C:43-7.1.a (West 1995)	Life imprisonment without parole for third violent felony conviction
New Mexico	Criminal Sentencing Act § 23(A), N.M. STAT. ANN. § 31-18-23.A (Michie 2000)	Life imprisonment for third violent felony conviction

Jurisdiction	Provision(s)	Enhancement
New York	Penal Law § 70.10.1(a), .2, N.Y. PENAL LAW § 70.10.1(a), .2 (McKinney 1998)	Imposes sentence authorized for a class A-1 felony when defendant has been previously convicted of at least two felonies
North Carolina	N.C. GEN. STAT. § 14-7.7, .12 (1999)	Life imprisonment without parole for third violent felony conviction
North Dakota	North Dakota Criminal Code § 32-09.1.c, .2, N.D. CENT. CODE § 12.1-32-09.1.c, .2 (repl. 1997) (amended 2001)	Enhanced sentence of ten years to life for third felony conviction
Ohio	OHIO REV. CODE ANN. § 2929.14(A), (D)(2)(a) (Anderson Supp. 2000)	Sentence for a repeat violent offender may be enhanced up to ten years

Jurisdiction	Provision(s)	Enhancement
Oklahoma	Penal Code of the State of Oklahoma § 51.1.B, OKLA. STAT. ANN. tit. 21, § 51.1.B (West Supp. 2001)	Mandatory twenty year minimum sentence for a third felony
Pennsylvania	Sentencing Code § 14(a)(2), 42 PA. CONS. STAT. § 9714(a)(2) (Supp. 2000)	Mandatory twenty-five year minimum sentence for third crime of violence
Rhode Island	R.I. GEN. LAWS § 12-19-21(a), (b) (reenactment 2000)	Up to twenty-five year enhancement for third felony conviction
South Carolina	S.C. CODE ANN. § 17-25-45(A), (B) (Law. Co-op. Supp. 2000)	Life imprisonment without parole for a third conviction of a serious offense or a second conviction of a most serious offense as outlined in statute

Jurisdiction	Provision(s)	Enhancement
Tennessee	Tennessee Criminal Sentencing Reform Act of 1989 § 120(a), (g), TENN. CODE ANN. § 40-35-120 (repl. 1997)	Mandatory life imprisonment without parole for repeat violent offenders
Texas	Penal Code § 12.42(d), TEX. PENAL CODE ANN. § 12.42(d) (Vernon Supp. 2001)	Mandatory sentence between twenty-five and ninety-nine years for third felony conviction
Utah	Utah Criminal Code § 3-203.5(1)(b), (2), UTAH CODE ANN. § 76-3-203.5(1)(b), (2) (Supp. 2000); *id.* § 3-408, UTAH CODE ANN. § 76-3-408 (repl. 1999)	Habitual offenders convicted of violent felonies subject to various sentence enhancements depending on the nature of the offense; life imprisonment without parole for third conviction involving sex offense

Jurisdiction	Provision(s)	Enhancement
Vermont	VT. STAT. ANN. tit. 13, § 11a(a), (c) (1998)	Court may sentence defendant up to life imprisonment for third non-murder felony conviction
Virginia	VA. CODE ANN. § 19.2-297.1.A (Michie repl. vol. 2000)	Life imprisonment without parole for third conviction involving an act of violence
Washington	Sentencing Reform Act of 1981 §§ 3(31), 56, WASH. REV. CODE §§ 9.94A.030 (31); .560 (2000)	Life imprisonment without parole for persistent offender convicted of third violent felony
West Virginia	W. VA. CODE § 61-11-18(c) (repl. vol. 2000)	Life sentence for third felony conviction

Jurisdiction	Provision(s)	Enhancement
Wisconsin	Criminal Code § 939.62(2m) (b), (c), WIS. STAT. § 939.62(2m) (b), (c) (1997-1998)	Life imprisonment without parole for third serious felony conviction
Wyoming	Wyoming Criminal Code § 10-201, WYO. STAT. ANN. § 6-10-201 (Michie 1999)	Mandatory sentence of ten to fifty years for conviction of violent felony with at least two prior felony convictions; mandatory sentence of life for conviction of violent felony with at least three prior felony convictions